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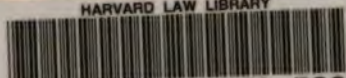
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REPORTS
OF
CASES ADJUDGED AND DETERMINED
IN THE
COURT OF CHANCERY
OF THE
STATE OF DELAWARE,

BY
JAMES L. WOLCOTT,

LATE CHANCELLOR (DEC'D).

PUBLISHED UNDER AUTHORITY OF THE GENERAL ASSEMBLY BY

JAMES L. WOLCOTT, JR.,
OF THE KENT COUNTY BAR

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PREFACE.

A word of explanation as to the delay in the appearance of this volume may justly be expected.

The work, begun by me in the lifetime of the late Chancellor, was first retarded by the necessity of collecting a number of the briefs of solicitors in the causes herein reported which had been returned to them upon their request.

Certain revisions of opinions which the Chancellor himself desired to make, consumed still further time. Then came his death.

These reasons, together with the demands of private practice, must plead excuse for any dilatoriness on my part.

I have felt that the established custom of giving some account of the life of a deceased Chancellor in the volume of reports published after his death, should be continued, and I therefore gladly accepted the kind offer of Henry Ridgely, Jr., Esq., of the Kent County Bar, to perform this part of the work for me. I desire here to acknowledge the invaluable assistance of Mr. Ridgely, not only in writing the account of the life of the late Chancellor, but in the general arrangement and preparation of this volume for publication as well.

JAMES L. WOLCOTT, Jr.

August, 1899.

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CASES IN CHANCERY.

DELAWARE.

In re Estate of MOSES JOURNEY, Deceased.

New Castle, September Term, 1892.

Wills — construction of; Trustees under a will to sell land — powers of; Remainders — vested or contingent.

1. It is a well-settled rule in equity, that land directed to be converted into money, or money into land, will be considered as that species of property into which it is directed to be converted. It is equally well settled, that the beneficiaries under a will, in which their interests arise from money, or land, ordered to be converted into one or the other, take as legatees or devisees according to the nature or quality of the property in its converted state or condition.
2. A devise to a wife for life, and after her death, the land to be sold and proceeds divided among the children, share and share alike, gives a vested interest to the children.
3. A devise for life to the wife, and after her death, the land to be sold, and proceeds divided among the children; the legal estate and title descends to the children and vests in them between the death of testator and actual conversion by sale.
4. An authority to make a sale of lands, under a will, is a mere naked power which carries with it no estate or title to the trustee or person having in charge the execution of the will.

Syllabus — Statement — Argument.

5. The testator, by item 2 of his will, devised to his wife, M. J., a farm during her life; and at her death, directed same to be sold, and the proceeds thereof to be equally divided among his children, share and share alike. Held,—
- a. That the interest to the children was a vested one, and that grandchildren took their parent's share.
 - b. That the legal estate in the land, between the death of the testator and the actual conversion of the same, descended to the children of the testator; and,
 - c. That one of the said children who lived on the land for a period between the death of the tenant for life and the sale of the land, was liable to the other children either on a contract for rent, or in case for use and occupation, less the value of permanent improvements made by him.

PETITION of Sarah Ann Munday for construction of certain portions of the will of Moses Journey, deceased. The facts are stated in the opinion of the Chancellor.

Benjamin Nields, for Sarah Ann Munday.

In the will of Moses Journey is found the following: "Item 2. I give and bequeath to my wife, Margaret Journey, all my personal property of whatever description and wherever situated, absolutely and forever. I also devise and bequeath to my wife Margaret Journey, my farm, situated in Christiana Hundred, and known as "Oak Hill," for and during the natural term of her life, and at her death, I desire said farm to be sold and the proceeds divided equally among my children, share and share alike."

On the principle that equity considers that as done which ought to have been done, it is well established that

Argument for complainant.

land directed to be sold and turned into money is to be considered as that species of property into which it is directed to be converted. The owner of the fund, or the contracting parties, may make land money, or money land. It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this kind. This doctrine is founded in justice and good sense; since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected and in whom no such discretion is expressed to be reposed. The principle is, besides, too well supported by numerous authorities, to be called in question at this day.

So, in the case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A., who, after surviving the testator, happens to die before the sale, the property devolves to his personal, not his real, representative, with all the incidental qualities of personal estate. 1 Jarman on Wills, 584, 585.

“Testator devised real estate to his daughter for life, and then to be sold and the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son; held (Sir James Wigram, V. C.), the deceased child took

Argument for complainant.

his share of the estate as personalty in reversion expectant on his mother's death, and, consequently, his executrix and not his son was entitled to it." Elliott v. Fisher, 35 Eng. Ch. Rep. *505.

"I will and bequeath to my wife Jane, the whole of my real estate during the whole of her life, if she remain my widow. At my wife's decease, my real estate to be sold and equally divided amongst my nephews and nieces, each to have an equal share."

"One of the nieces married and died in the life of the widow, intestate and without issue. Held, 1st, that the direction to sell was a conversion; 2d, the legacies to the nephews and nieces were vested; and 3d, that the husband of the nieces was entitled to her legacy."

If the direction to sell is absolute, it is no exception to the rule that land directed to be sold and turned into money is to be considered as money, from the death of the testator, for all the purposes of the will, because the period of sale is remote and the conversion cannot be made until the time arrives. The testator in the case before us directed, at his wife's decease, his real estate to be sold and equally divided amongst his nephews and nieces. The direction is positive and explicit; and it follows that it operated as conversion of the real estate into money from the testator's death and that it is to be treated as money for all the purposes of his will. Were, then, the legacies to the testator's nephews and nieces vested or contingent? Where the fund, which is the subject of the legacy, is given to another person beneficially for life, or until the legatee arrives at a particular age, or until certain debts are paid, the legatee will take an immediate vested interest

Argument for complainant — Argument for defendant.

in the subject, since such bequests are in the nature of remainders, the rule as to which is, that the interest of the first and subsequent takers vest together. *Lane v. Goudge*, 9 Ves. 226; *Balmain v. Shore*, id. 507.

There can be no doubt under these authorities that the legacies in this case vested in the testator's nephews and nieces immediately on his death.

"The testator was making an equal distribution of his real estate among his nephews and nieces, and the distribution was postponed, in order to make comfortable provision for the widow in lieu of her dower under the Intestate Act. If this necessity had been out of the way, the distribution would have been immediate. There was no consideration or circumstance, immediately connected with the legatees, which was the ground of the postponement. It cannot be reasonably inferred that the testator intended that the gift to his nephews and nieces should depend on their surviving the widow; and that if they died during her life, leaving issue, their shares should go to the next of kin to the exclusion of their children. If there had been no conversion of the real estate, there can be no doubt that they would have taken a vested interest in the remainder. Why should the direction to sell and divide the proceeds make the gift contingent? The wife's decease is not a condition precedent to its vesting, but is merely the time fixed for its enjoyment." *In re Estate of Dr. George Stevenson*, Deceased, 3 Del. Ch. 197.

Lewis C. Vandegrift, for John Journey.

At common law one tenant in common could not collect from the other any rent for occupation of the

Argument for defendant.

premises, nor had one tenant in common any remedy against another for an exclusive occupation of the premises. This rule of the common law was changed by the statute 4 Anne, chap. 16, § 27: "An action of account may be maintained against the personal representative of any guardian, bailiff or receiver, and also by one joint tenant or tenant in common or his personal representative against the other as bailiff for receiving more than comes to his just share or proportion, or against the personal representative of any such joint tenant or tenant in common."

This statute was interpreted by the English courts to mean that such an action would lie against a tenant in common who had received from some third person more than his share or proportion of what that third person had paid for the tenancy of the property in question, and that it did not extend to the case where one of the tenants in common occupied the premises himself. In the latter case there could be no recovery by one out of possession against the one in possession under the statute 4 Anne. *Henderson v. Eson*, Eng. C. L. 701.

The above-cited authority has been followed by most of the American courts, especially Massachusetts, New York, Maryland and California.

There would, therefore, be no doubt about the inability of one tenant in common to collect rent from another in Delaware, were it not for the statute in this State, which provides that "a tenant in common * * * may maintain against his co-tenant an action on the case for use and occupation."

Argument for defendant.

This statute is anything else than explicit, and words must be supplied in order that its meaning may be understood. It evidently means that such an action may be maintained when one tenant in common has received more than his just share or proportion of the rents and profits of the estate; and is, therefore, practically the same as the statute of 4 Anne.

The only way such a tenant could receive more than his just proportion by use and occupation would be by the act constituting him a bailiff for the other.

This is impossible, for he went into possession without opposition from the other tenant; did nothing to exclude his co-tenant from a common occupation of the premises and made him no contract or promise to pay him rent therefor.

Each tenant in common is seized *per my et per tout*, and, therefore, the tenant had the right to occupy a part of every part of the premises in question.

In order to recover in such an action, the plaintiff co-tenant would have to show that his co-tenant in possession occupied the whole of the premises, and that he took from the premises the whole of its product and that, after paying the expenses, there remained a profit.

The allegations necessary to sustain proof that would be sufficient for a recovery in a case of this kind, must be that the tenancy in common exists, and how it exists, that the tenant in possession excluded his co-tenant therefrom and that he took all the profits from all the property.

It is not enough to show merely that one co-tenant was in possession, because this in itself would not entitle a recovery by another co-tenant. The fact that the

Argument for defendant.

latter would not consent that the former should come into possession, or would not make a bargain with him as to rent, would not prevent his occupancy of the premises, and an endeavor upon the part of the occupant to make the most he could out of the estate in which he had an interest. Were this the case, one co-tenant, by acting the part of the dog in the manger, might allow the estate to go to waste and ruin.

The cases supporting what I have above stated are, *Sargent v. Parsons*, 12 Mass. 149; *Sheppard v. Richards*, 2 Gray, 424; *Davidson v. Thompson*, 22 N. J. Eq. 85; *Barrel v. Barrel*, 25 id. 175; *Isarel v. Isarel*, 30 Md. 125; *Woolaver v. Knapp*, 18 Barb. 265.

Returning now to the statute in our own State, it will be seen that a recovery for use and occupation is allowed upon the ground that the tenant is in possession by permission without demise by deed or contract under seal for the rent. Such a permission could not exist between tenants in common, because each is entitled to occupy the whole and every part of the property in question. If one tenant kept another out, then there could be no recovery for use and occupation, for reason that under the authorities he would be a disseizor, and rent cannot be claimed from one who has disseized another, but the remedy of the one disseized is by ejectment to recover his possession and establish his title.

I, therefore, submit that from what I have heretofore said, and the authorities cited, that the petition of Sarah Ann Munday has shown no right to collect rent from her co-tenant John Journey, who was in possession of the premises of Moses Journey, deceased. The fact that

Argument for defendant.

there was no tenancy is also shown from the petition for the appointment of a trustee, originally filed in this case, where it is set forth that there is no one having authority to rent the property in question or collect the rents therefrom.

The unfairness of the claim made in the petition of Sarah Ann Munday can be realized when it is considered that each co-tenant "has at all times the right to enter upon and enjoy every part of the common estate, this right cannot be impaired by the fact that another of the cotenants absents himself or does not choose to claim his right to an equal and common enjoyment; it would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labor and business enterprise when he has no right to call upon his co-tenant to contribute anything toward the production of these profits, nor to bear his proportion, when, through bad years, failure of crops, or other unavoidable misfortunes, the use made of the estate resulted in a loss instead of a profit to the one in possession."

The next question submitted is whether John Journey can collect from the fund now in the court before it is divided among the co-tenants entitled, compensation for services rendered and expenses incurred in caring for said property while he was in possession thereof, and put it in salable condition.

That he should be reimbursed for such services and expenses is supported by the following authorities: Dech Appeal, 57 Penn. St. 472; Davidson v. Thompson, 22 N. J. Eq. 85; Hannan v. Osborne, 4 Paige, 343.

Opinion.

WOLCOTT, CHANCELLOR.—Moses Journey was, in his lifetime, and at the time of his death, seized in his demesne as of fee of and in a certain farm or tract of land known as Oak Hill, situated in Christiana Hundred, New Castle County, and State of Delaware; and that while so thereof seized, he duly made and published his last will and testament; by item 2 of which, he devised to his wife, Margaret Journey, said farm or tract of land during the term of her natural life; and at her death directed the same to be sold and the proceeds thereof to be equally divided among his children, share and share alike.

In said will he nominated and appointed Victor du Pont, Esq., to be the executor thereof.

That the said testator afterward, to-wit, in the month of March, A. D. 1879, departed this life and left to survive him his widow, Margaret Journey, and six children, namely: John Journey, Henry Journey, George Journey, Moses Journey, William Journey and Sarah Ann Munday.

That the above-named William Journey, on or about the 26th day of October, A. D. 1879, departed this life, leaving to survive him three children, namely: Emma Journey, William Journey and Margaret Journey, now the wife of Samuel Chambers. All of said children being now over twenty-one years of age.

That the above-named Moses Journey, the younger, on or about the 9th day of July, A. D. 1887, departed this life, leaving to survive him five children, namely: Mary Journey, now the wife of James H. Massey, and over the age of twenty-one years; and William Journey,

Opinion.

Margaret Journey, Joseph Journey and Edward Journey, all of whom are infants, and represented in this proceeding by guardians.

That from and after the death of the said testator, his said widow, the said Margaret Journey, held said farm or tract of land under said devise as tenant for life until her death, which occurred about the 14th day of October, A. D. 1890.

That on the 19th day of October, A. D. 1891, upon the petition of all the parties in interest, it was ordered by the Chancellor that the said lands and premises be sold at public vendue, and that the proceeds arising from the sale thereof, after deducting the necessary expenses, be equally divided among the children of said testator pursuant to said last will and testament; and to that end Benjamin Nields, Esq., was appointed trustee, to make said sale as in said order directed.

It was further ordered by the Chancellor that the said trustee should enter upon, hold and manage said farm or tract of land, collect the rents, issues and profits thereof, from the time of the death of the said Margaret Journey, until such time as the sale of said lands and premises should be made and confirmed, and should duly account for the same. That the return of the proceedings of said trustee under said order should be made at the next term of the Court of Chancery sitting in New Castle County. That on the 29th day of March, A. D. 1892, the said trustee made return to this court that he did on the 21st day of November, A. D. 1891, sell the said lands and premises to James Brown for the sum of \$6,000, he being the highest and best bidder

Opinion.

therefor, which said return and the sale therein set forth were proved and confirmed; and the purchase money, to-wit, the sum of \$6,000; having been paid to the said trustee, he was ordered by the Chancellor to execute and deliver to the purchaser of the said premises, a deed, conveying to the said James Brown all the estate and interest of the said Moses Journey the elder, at the time of his death, to and in the premises so sold.

It was further ordered by the Chancellor that the balance of the purchase money, after deducting the cost and expenses of sale, to-wit, the sum of \$5,789.98, be deposited by the said trustee in the Farmers' Bank at Wilmington, to the order of this court, there to remain subject to the further order of the Chancellor.

That on the 25th day of March, A. D. 1891, the said John Journey, one of the children of the said testator, entered upon the said lands and premises and occupied and used the same until the 25th day of March, A. D. 1892.

It is contended by the other parties in interest, that he, the said John Journey, entered into the possession of said lands and premises under an agreement between himself and them, made with the said Henry Journey and George Journey in their behalf, whereby he, the said John Journey, was to pay an annual rent of \$250 for the use and occupation of said lands and premises for the year expiring on the 25th day of March, A. D. 1892.

It is admitted by the said John Journey that he has not paid the said trustee the said rent, and he denies that he is liable to pay any rent. He further claims that the money which he expended while on said farm

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and the work which he performed in the making and erecting of permanent improvements thereon, should be deducted from the said amount on deposit in the Farmers' Bank at Wilmington to the credit of this court, and the balance thereof distributed among the parties entitled under the will.

The first question arising under the will of the said testator is, what interest do the children of the deceased children of the testator take in the fund to be distributed? It is a well-settled rule in equity, that land, directed to be converted into money, or money into land, will be considered as that species of property into which it is directed to be converted. It is equally well settled, that the beneficiaries under a will in which their interests arise from money or land ordered to be converted into one or the other, take as legatees or devisees according to the nature or quality of the property in its converted state or condition.

Let us apply these equitable principles to the case in hand.

The late Moses Journey, deceased, by item 2 of his last will and testament, after the death of his widow, ordered his farm or tract of land known as Oak Hill to be sold, and the proceeds thereof equally divided among his children, share and share alike. The only interest which they had under said will was in the proceeds of the sale made in pursuance of the authority contained in said item of said will. Therefore, the share or interest of each of his children, living at the time of his death, in the fund to be produced by the sale of the farm was legally a pecuniary legacy. Was it vested or contin-

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gent? Clearly it was not contingent, for the right to it vested immediately upon the death of the testator, since the conversion of the land into money in equity was considered complete at the moment of his decease.

The title of each legatee to his or her share of the fund to be created by the sale of the land, was absolutely free from any element of uncertainty. It was vested in interest, but not in possession. It was a present gift, the time for the enjoyment of which was deferred until the death of the tenant for life. The intervening life estate in the land, only operated as a postponement of the time for the payment of the legacy. The uncertainty or contingency was, therefore, annexed to the period for payment only, and not to the *corpus* of the gift. The children, therefore, of each of the deceased children of the testator are entitled by right of representation to the share of said fund to which their parent would be entitled if now living.

Another question arises upon the facts testified to at the hearing of this case in regard to the liability of Moses Journey to pay \$250 for the use and occupation of said farm for the year commencing March 25th, A. D. 1891, and ending March 25th, A. D. 1892.

I am of the opinion that the legal estate and title in and to said farm and tract of land, between the death of the testator and the actual conversion of the same, descended to the children of the said Moses Journey the elder. The authority to make a sale of said lands and premises was a mere naked power which carried with it no estate or title, to the trustee or the person having in charge the execution of the will. This view

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is clearly sustained by the English authorities, and also by the case of *Lockwood's Administrator c. t. a. et al. v. Stradley et al.*, 1 Del. Ch. 298; *King v. Ferguson et al.*, 2 Nott & McCord, 398; *Warnford v. Thompson*, 3 Ves. Jr. 515; 2 Sugden on Powers, 170, 171; *Yates v. Crompton*, 2 P. Wms. 308; *Hilton v. Kenworthy*, 3 East, 557; *Fletcher v. Ashburner*, 1 Brown C. C. 497; *Cain v. Gott*, 24 Wend. 660.

Admitting the rule to be as enunciated in the cases referred to, it is very apparent that the heirs-at-law of the testator had the right to contract with each other in respect to the lands and premises in question, and without any contract John Journey was liable to the other heirs or coparceners upon an action on the case for use and occupation, under section 2, chapter 86, page 527, Revised Code. Laying aside all the testimony in regard to the agreement between John Journey and Henry Journey and George Journey, he, John Journey, was and is liable to his co-tenants for the rental value of the farm for the year before referred to. It having been proven that the rental value of the farm for the year A. D. 1890, was fixed at \$250 I am justified in the conclusion that that sum was a fair rent for the succeeding year; and that John Journey is liable to his co-tenants for the same. The permanent improvement, which were made and erected on the farm, I am of the opinion should be a credit on the rent account. In view of the meagre testimony on that point, I feel constrained to fix the value of such permanent improvements, according to the testimony of John Journey himself and the witnesses which he produced in behalf of his claim.

Syllabus — Statement.

MARY VAN VRANKIN v. SARAH E. ROBERTS, CHARLES ROBERTS, THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, and THE SECURITY TRUST AND SAFE DEPOSIT COMPANY.

New Castle, March Term, 1898

Mortgages — foreclosure of; In equity and at law — the institution of the former, a constructive abandonment of the latter; Remedies — when election must be made in exercise of, and when may be used concurrently.

1. The concurrent use of two or more remedies adapted to the enforcement of a mortgage debt, each of which would produce precisely the same result, falls without the rule permitting a mortgagee to exercise all his remedies concurrently.
2. In Delaware a mortgagee has a right to proceed on his mortgage in equity and at law. In equity by foreclosure, at law by *scire facias*. He also has the right to proceed on his bond or other legal security for the debt. There is no doubt that he may pursue the last-named remedy, and either of the others, at the same time, so that he does not take double satisfaction.
3. A mortgagee proceeding by *scire facias* in the Superior Court, and afterward by a bill in equity, in which latter proceeding the property was sold, cannot recover costs incurred in the former proceeding.
4. A mortgagee cannot use concurrently his remedy by *scire facias* and by bill in equity, and the beginning of the latter is a constructive abandonment of the former previously begun.

PETITION to draw money out of court.

Petition of the Security Trust and Safe Deposit Company of Wilmington, to draw certain moneys out of

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court, deposited in the registry thereof, pursuant to a decree of the court confirming the sale of certain lands upon which it held a second mortgage and which were sold under a previous decree, foreclosing a first mortgage thereon, held by the Pennsylvania Company for Insurance of Lives and Granting Annuities, as assignee.

Petition also of Mary Van Vrankin, to withdraw a portion of said fund, to pay certain costs incurred in obtaining judgment in her behalf, by *scire facias* proceedings on said first mortgage for arrears of interest on the unpaid balance of the principal and the costs attending the execution process that followed.

Alex. B. Cooper, for complainant.

The fund in court is a part of the proceeds of sale of the lands of Sarah E. Roberts, which were sold by order of this court, "free and discharged from all liens and incumbrances," and particularly from the lien of a certain mortgage, given by Wm. Millward (a former owner) to Nathan T. Boulden, conditioned to pay the interest of \$200 to Mrs. Van Vrankin during her life, which was in lieu of her dower in said premises, as the widow of Nathan Boulden.

Mrs. Van Vrankin prior to filing her bill in Chancery, had issued a *scire facias* on the mortgage for interest, and had recovered judgment thereon.

The only question here is, should the costs on that judgment, as an existing lien, be first paid out of this fund?

The validity of that judgment cannot be questioned in this court. It was rendered by a court of compe-

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tent jurisdiction and is conclusive until set aside by it. It cannot be collaterally attacked. 8 Am. & Eng. Ency. of Law, 245.

The principal of the judgment has been paid, but the costs have not; they are just as much a part of the judgment as the principal, and on a sale are always first paid. Freeman on Judgments, § 338.

The fund in court stands in the place of the land, and is subject to its burdens. Freeman on Judgments, § 400; Freeman on Executions, § 447.

This judgment is upon the very mortgage to which this fund in court is principally applicable, and must be paid; there is no discretion about it.

We did not abandon our rights to proceed at law. We came into Chancery because the remedy was more complete to secure our future interests.

We had a right to proceed at law for installments due. And the lien of those not due attaches to the proceeds of sale. Rev. Code, 687, § 55; 2 Hilliard on Mortgages, 74, 50, 52, 250, 251 and 252; 2 Tidd's Pr. 1102, 1107; 34 Penn. St. 223; 9 Mass. 258; 1 Douglas (Mich.), 217; 11 Penn. St. 282.

Judgment on a *scire facias* is only an award of execution. Rev. Code, 687, §§ 55, 57; Freeman on Executions, § 81; 16 N. J. Law, 94; 2 Hilliard on Mortgages; 1 Md. Ch. 87.

Proceedings may be had both at law and in equity. The remedy is concurrent, and we are entitled to our costs in both. 2 Hilliard on Mortgages, 103, 107, 111; 24 Mo. 265; 1 Md. Ch. 87; 2 id. 322.

Benjamin Nields, for respondents.

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WOLCOTT, CHANCELLOR.— These adverse applications grew out of the double proceedings on the first mortgage for the sale of the lands described therein, instituted by Mary Van Vrankin, by bill to foreclose in Chancery and by *scire facias* in the Superior Court in and for New Castle County. The material facts are set forth in the bill and are substantially as follows:

Nathan Boulden, late of Pencader Hundred, New Castle County, and the State of Delaware, in and by his last will and testament devised to his son, Nathan T. Boulden, a certain farm situated in said hundred, in fee-tail, subject to the right of dower in his wife, Mary Boulden; the value of which in money to be paid to her by his said son annually. For the purpose of carrying into effect the provisions of the said will in respect to said dower, the said Nathan T. Boulden and Mary Boulden, by mutual agreement, did appoint J. R. Price, John McCracken and C. B. Ellison to ascertain the annual value thereof in money; who did by a written report, dated April 9, 1851, estimate it to be \$200. The said Nathan T. Boulden thereafter paid said amount to the said widow as the same came due, to-wit, on the 25th day of April in each and every year as long as he continued to hold said farm. On the 10th day of January, A. D. 1868, he conveyed said farm to one William Millward, now deceased, subject to said annual charge of \$200; and to secure a part of the purchase money therefor, the said Millward and wife executed and delivered to the said Boulden a bond and mortgage for \$12,000, with interest, payable on or before the 25th day of March, 1880. In the condition of

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said mortgage it is provided among other things, "that out of the accruing interest, the sum of \$200 annually be paid at the time aforesaid by the said Millward to Mary Boulden, who had then become Mary Van Vrankin, in lieu of her dower, with a provision that if she shall be living at the time when the principal sum shall fall due, the said Millward, his heirs and assigns, shall retain during the life of the said widow, so much of the principal sum as shall secure the said annual sum during her life." Said bond and mortgage were afterward assigned to the Pennsylvania Company for Insurance of Lives and Granting Annuities, which is now the legal holder of the same. The money due thereon at the time of the sale under the decree for foreclosure was \$3,333.33 1-3, together with the annuities or arrears of interest due the said widow, amounting to the sum of \$550, with the interest on each annuity from the date upon which it was payable.

On or about the 20th day of September, 1876, the said lands and premises were conveyed by the executor and widow of the said William Millward, then deceased, according to the provisions of his will, to one James W. Dodson. The said James W. Dodson and wife, on the 9th day of December, 1878, conveyed the same to Addie B. Cochran, and Addie B. Cochran and E. R. Cochran, her husband, on the 28th day of February, 1885, conveyed the same to Sarah E. Roberts, of the City of Chester, in the State of Pennsylvania, who was the owner of the land at the time of the decree for foreclosure, and the sale thereunder.

On the same day, the said Sarah E. Roberts and her

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husband executed and delivered a bond and mortgage to the said Addie B. Cochran, covering the said lands and premises, for \$11,000, a part of the purchase money therefor payable at the expiration of five years from the date thereof, which said bond and mortgage were afterward duly assigned to the said The Security Trust and Safe Deposit Company. By the records of the Superior Court, it appears that the said Pennsylvania Company for Insurance of Lives, etc., in behalf of the said Mary Van Vrankin, sued out a *scire facias* in the Superior Court aforesaid, on the first-named mortgage, against the executors of William Millward alone, and obtained judgment thereon for the respective annuities in arrear, with interest thereon from the dates of their maturity respectively, upon which a *levari facias* was issued, and sale of the mortgage premises made, and at the term of said court, to which said writ was returnable, said sale was set aside. Afterward foreclosure proceedings on said mortgage were instituted in this court, which resulted in the sale of the mortgaged premises, a part of the proceeds of which is the fund now in controversy.

The question presented by the facts in this case is: Whether the costs incident to the judgment obtained on the first mortgage and the *levari facias* issued thereon constitute a part of the mortgage debt which must be paid out of the fund produced by the sale of the mortgaged premises before any part thereof can be applied to the second mortgage?

If the judgment was a nullity because the rights of the equitable plaintiff under the peculiar condition of

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the mortgage were such as a court of law was not competent to adjudge or determine, or on account of the omission to make the owner of the equity of redemption one of the party defendants, there could be no ground of dispute as to the exoneration of the fund in question from liability to pay the costs taxed on the judgment and the execution that followed. If the judgment is invalid for either of the causes above named, the costs would fall on the party making the mistake, and not on the mortgagor or his alienees, upon the principle that every one should suffer the consequences of his own folly. Whether the judgment was a nullity or not, it is not necessary now to decide as the question before the court may be disposed of on other grounds.

Assuming that the petitioner, Mary Van Vrankin, had a complete right to sue in a legal forum, in the name of the assignee as she did, for the purpose of asserting her rights stipulated for in the mortgage, and assuming that it was not necessary to make the terre-tenant of the mortgaged premises one of the party defendants according to the contention of her solicitor, yet can the fund under the facts in the case be subjected to the payment of the costs in question to the detriment of the second mortgage creditor?

In my opinion it cannot.

While reason and authority too, when confined within the limits determined by the facts in each case, concur in sustaining the soundness of this view, yet the ability and earnestness with which the solicitor for Mrs. Van Vrankin maintained the opposite view and its apparent harmony with the well-established rule which allows a

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mortgagee to pursue all his remedies concurrently, require a statement of the reasons upon which such conclusion is based.

This rule is only an exception to the general rule, that a debtor shall not be harassed by a multiplicity of suits for the same debt at the same time. Resting as it does upon the clearest principles of equity and justice, courts distinguished for their strong common sense and enlightened judgments, would not have tolerated for a moment the exclusion of mortgages from their operation without a substantial and satisfactory reason therefor. If no such reason can be discovered, the exception is left with no higher ground to stand on than a judicial concession to the spiteful and variable moods of capricious and merciless creditors. I would be loath to acquiesce in such a conclusion, as it would amount to an impeachment of the wisdom and justice of the great men by whose genius and industry the splendid systems of English and American jurisprudence have been developed and reared to their present state of perfection.

Now, what is the reason for this exception? Does it not lie in the fact that a mortgagee, in respect to the several remedies which he may employ to enforce the payment of his mortgage debt, enjoys advantages that other creditors do not possess? Clearly it does. Now, adopting this principle as the test of its availability, as a controlling rule of law in a given case, it must be conceded that the concurrent use of two or more remedies adapted to the enforcement of a mortgage debt, each of which would produce precisely the same result, falls

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without the reason of the exception because the mortgagee could derive no possible advantage therefrom. Such a case would come within the general rule which compels the election of the forum, and the remedy in which and by which to prosecute his demand. To allow the exception to be stretched beyond the limits necessary to the enjoyment of such a preference or advantage, would be giving judicial sanction to the abuse of the remedial process of this court. The only end that could thereby be subserved would be the accumulation of costs on the mortgagor and perhaps the gratification of a desire to aggravate his misfortunes by imposing this additional burden on his back. Courts of equity as well as courts of law are shy of exceptions to general rules which wink at, much less encourage, such a practice.

The rule or exception under consideration is a common-law principle originally established and announced by the English courts. It still inheres in that great system of law which was introduced or brought into this country by our colonial ancestors as their birth-right; so far as it has not been modified by statute or the necessities of our new and changed conditions. In determining, therefore, the extent of its application in our courts, it is necessary to notice the analogy between the remedies which the laws of this State afford to mortgagees, and those which the English common law afforded at, and since, the date of our independence. So far as this analogy holds good, the English rule must prevail; when it does not, our courts are at liberty to adopt such rules or practice as are most consistent with their ideas of justice and the conservation of the rights and interests of the parties concerned.

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Let us see now what those remedies are, in England, relative to the concurrent use of which this rule or exception was judicially formulated and promulgated. There a mortgagee may foreclose the equity of redemption in Chancery, bring an action of ejectment in a court of law, and proceed on his bond or other legal security for the debt. But it must be observed that no two are alike in effect. They each accomplish a different result. Foreclosure has for its end the conversion of the mortgaged premises into money and the extinction of the equity of redemption. Ejectment has for its end the recovery of the possession of the property after condition broken leaving outstanding the equity of redemption in the mortgagor or his alienees. Foreclosure and ejectment are real remedies. The other is personal by which payment of the debt may be enforced against the personalty of the mortgagor or other realty not embraced in the mortgage. Each of these remedies offer advantages that the others do not. And in order that the mortgagee may have them all at the same time, he is allowed to pursue all his remedies concurrently. While they are *in fieri*, it is impossible to ascertain with certainty which will be the most effectual.

In Delaware, a mortgagee has a right to proceed on his mortgage in equity and at law. In equity by foreclosure; at law by *scire facias*. He also has the right to proceed on his bond or other legal security for the debt. There is no doubt that he may pursue the last-named remedy and either of the others at the same time so that he does not take double satisfaction. The one is not a bar to the other, not so much because the one is a proceeding *in rem*, and the other proceeding *in*

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personam, but because each secures to the mortgagee advantages which the other does not. The one is auxiliary or supplementary to the other. In what the real remedy may fail to accomplish the personal may supply and *vice versa*. The first two are restricted to the specific pledge, the other is not confined to any particular kind of property, or to any particular property of a particular kind. It is general in its operation.

But can the common-law rule or exception, before referred to, be invoked as authority for the running of the *scire facias* on the mortgage and foreclosure successively, or at the same time? Surely not, for the conditions in this State and in England are very dissimilar. Foreclosure and ejectment, which, in the latter country, are the remedies out of which sprang the necessity for the enunciation of the exception, are totally different not only in form, but in effect. As before seen, they are each intended for a different purpose. Now the remedy by *scire facias* in this State accomplishes precisely the same thing as foreclosure. They both seek the same end, namely, the conversion of the mortgaged premises into money and the extinguishment of the equity of redemption. The latter is equitable foreclosure; the former may be called legal foreclosure, because they are in effect the same. It is just here that the analogy between the specific or real remedies on a mortgage in England, and in this State fails, which sweeps away the ground of contention that was so earnestly made in behalf of the applicability of the exception in our own courts. What good end could be served by allowing foreclosure and *scire facias* to be pursued at the same

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time, or, in other words, what advantage could it be to the mortgagee? None at all. By the use of either he could get the land, by the concurrent use of both, he could get no more. The reason then for the exception so far as they are concerned, entirely fails. At the point when the reason ceases, the exception itself should cease. *Cessante actione legis cessat ipsa lex.*

I do not think the authorities cited, when limited to the facts on which the decisions are based, militate very strongly against the position here taken. Beyond the scope determined by the facts, they are *obiter dicta*. It will be found, upon an examination of the cases in which the exception was recognized and acted on as a rule of law, that in nearly all of them the only question before the court was whether a mortgagee could foreclose in equity and proceed on his bond or other security in a court of law at the same time. That was the precise question in the case of *Bumell v. Marten*, reported in 2 *Douglass*, at page 401, in which Lord Mansfield declared, "that it had been settled over and over again that a person in such a case (a mortgagee) is at liberty to pursue all his remedies at once." It was also the only question in the case of *Scholes v. Sall*, and in *Scholes & Lefroy*, in which Lord Redesdale announced the same doctrine, "that a mortgagee has a right to proceed on his mortgage in equity and on his bond at law at the same time." The right of a mortgagee to pursue these remedies at once is not involved in the present case. That right is not questioned, neither can it be.

In the case of *Booth v. Booth*, 2 *Atk.* 343, in which the question before the court was whether a mortgagee

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could concurrently proceed in equity to foreclose, and at law in ejectment, Lord Hardwicke pertinently observed, "Though the defendant is foreclosing the equity of redemption here (Chancery), yet he is not precluded from bringing an ejectment at law at the same time unless there is something very particular to take it out of the common case." While in England and in some of the States there is no technical objection to employing both of these remedies at once, as has before been shown, yet the hardships that sometimes attend such a practice, it appears, has not escaped the attention of the judicial mind. For reasons already given, there is a special equity, or to use the language of Lord Hardwicke, "there is something very particular" to exempt a mortgagor in this State from the operation of this rule or exception as to the concurrent use of the *scire facias* and foreclosure remedies provided for the enforcement of the payment of the mortgage debt. I might continue the review of the cases, both English and American, in which this question has been considered to a much greater length, but I have gone far enough in this direction to show, I think, that the authorities when restricted to the points decided, are not antagonistic to the view taken in this case.

Holding to this view, the commencement of foreclosure proceedings in this court was a constructive abandonment of the legal proceedings in the Superior Court, which, as a matter of course, entailed upon the plaintiff therein the costs incident to the same. Let the order, therefore, be drawn directing the payment of the entire fund in question to the Security Trust and Safe Deposit Company.

Syllabus.

GEORGE U. REYBOLD v. EDWIN C. REYBOLD, Trustee,
et al.

New Castle, March Term, 1898.

Legacies — vested or contingent.

The testator, P. R., bequeathed to his son, J. R., in trust for the three blind children of said J. R., namely: G. U. R., E. R. and J. R., 100 shares of bank stock which, together with dividends, he directed should be invested for said three blind children during the lifetime of said J. R., and if either of said blind children should die under age and unmarried, said shares should belong to the survivor or survivors. And by a codicil thereto, he further provided that if all of said blind children should die under age and without issue, then said stock should be divided equally among all of his children. J. R., one of said children, died over the age of twenty-one years, unmarried and without issue, leaving as his legatee, G. U. R.. E. R. died over the age of twenty-one years, unmarried, without issue and intestate. Held,

- a. That the estates in said bank stocks became, immediately upon the death of P. R., the testator, a vested estate.
- b. That said estates were subject to be divested in favor of the survivor or survivors of said blind children upon the death of any of them, under age and unmarried, or in favor of the children or their representatives of the said P. R., deceased, upon the death of all of said blind children under age and without issue.
- c. That said gifts of said stock upon the happening of said events, can now never take effect. And,
- d. That at the time of the deaths of J. R. and E. R., they owned their respective shares of stock by an absolute and indefeasible title.

Statement.

BILL IN EQUITY.—Philip Reybold, Sr., departed this life on or about the 28th day of February, A. D. 1854, having first published his last will and testament, which provided *inter alia* as follows:

“Third, I give and bequeath to my son, John Reybold, in trust for his three blind children, George U. Reybold, Elizabeth Reybold and John Reybold, one hundred shares of the capital stock of the Delaware City Bank, standing in my name upon the books of the said bank, and do direct the accruing dividends shall, from time to time, be invested for the said children during the lifetime of my said son, John Reybold, and that if either of the said children should die under age and unmarried, the share of the stock of such children shall belong to the survivors or survivor.”

To which said will and testament there was annexed the following codicil:

“Third. In regard to the bequest to the three blind children of John Reybold, mentioned in the third clause of my will, I make this further disposition, that if all the said children should die under age and without issue, that the said one hundred shares of stock shall be divided among all my children, or the representatives of such as are deceased, in equal shares, the income of the seized fund to be applied to my said son John, in the education of the said children, if he thinks fit.”

The said testator left to survive him, among others, his son, John Reybold, and all of his said three blind grandchildren, to-wit: George U., Elizabeth and John Reybold. John Reybold the elder died about the

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31st day of August, A. D. 1862, and trustees under the said clauses in the will of Philip Reybold, Sr., deceased, having from time to time been appointed until the present time, and Edwin C. Reybold, said respondent, is now acting trustee and custodian of the said stock, etc.

Of the three blind children, John Reybold the younger attained the age of twenty-four years, and died on or about the 9th day of April, A. D. 1869, unmarried and without issue; but having made his last will and testament under which the said George U. Reybold, his blind brother, is sole beneficiary.

Of the two remaining blind children, Elizabeth Reybold attained the age of forty-seven years, and on or about the 17th day of July, A. D. 1890, died unmarried and without issue, and intestate, leaving as her only heirs-at-law of the whole blood, her blind brother, the said George U. Reybold, and her brother Clayton B. Reybold.

The remaining third child, the said George U. Reybold, is the complainant in this bill of complaint, and is of the age of fifty years, married, but so far without issue.

All the surviving children of said Philip Reybold, Sr., deceased, and the representatives of such as are deceased, are among the respondents to this bill of complaint.

This bill being filed by the said George U. Reybold for construction of certain portions of the will of said deceased.

Argument for complainant.

H. H. Ward, for complainant.

The questions presented by the bill of complaint in the above-stated case, arise out of the third section of the last will and testament, and the third section of the codicil to the last will and testament of Philip Reybold, deceased. These sections read as follows:

Will.

"Third, I give and bequeath to my son, John Reybold, in trust for his three blind children, George U. Reybold, Elizabeth Reybold and John Reybold, one hundred shares of the capital stock of the Delaware City Bank, standing in my name upon the books of the said bank, and do direct the accruing dividends shall, from time to time, be invested for the said children during the lifetime of my said son, John Reybold, and that if either of the said children should die under age and unmarried, the share of the stock of such child shall belong to the survivors or survivor."

Codicil.

"3. In regard to the bequest to the three blind children of John Reybold, mentioned in the third clause of my will, I make this further disposition, that if all the said children should die under age and without issue, that the said one hundred shares of stock shall be divided among all my children, or the representatives of such as are deceased, in equal shares, the income of the seized fund to be applied to my said son John, in the education of the said children, if he thinks fit."

Argument for complainant.

The questions presented by these sections of this will and codicil seem to be as follows:

I. Is the estate of the three blind children of John Reybold the elder in the 100 shares of bank stock a vested estate, and if so, when did it become so?

II. Under what conditions that estate, if vested, can, under the limitations of the said will, be divested, and whether the gift over of said stock can now ever take effect?

III. In whom now, the beneficial interest in said property is vested?

IV. Whether this court should now determine the trust and order an assignment of said stock and property, by said present trustee, to the person or persons now beneficially interested?

I. The words of the will give the blind children an immediate fixed right of present enjoyment. This is a perfect description of an estate vested in possession. Bouvier's Law Dictionary, word "Vest;" Fearn on Contingent Remainders, 1; 1 Roper on Legacies, 375, etc. (ed. of 1829).

This legacy was vested immediately upon the death of Philip Reybold, Sr., the testator, subject only to be divested upon the happening of the two contingencies mentioned in said will. The limitation over to the survivors or survivor, or to the children of the testator, or their representatives, in the event of either of said legatees dying under age and unmarried, or in the event of all of said legatees dying under age and without issue,

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does not prevent the vesting of said legacy on the death of the testator. The legacy would vest at once, but be subject to be divested, upon the happening of the events mentioned. 1 Roper on Legacies, 403, etc. (ed. 1829); Davidson v. Dallas, 14 Ves. Jr. 576; Deane v. Test, 9 id. 147, 152; Shepherd v. Ingram, Ambler, 448.

Speaking generally, the incidents of ownership and rules of law applicable to legal estates, apply with equal force to the estates of *cestuis que trust*, in a private trust; therefore, the fact that the personal property in question was originally left to "John Reybold, in trust for his three blind children," etc., does not affect the question of the vesting of said estate, at any stage of this argument. Bispham's Equity, 89, §§ 59, 60 (4th ed.).

II. Under what conditions are the estates of said three blind children divested under the limitations of said will, and will the gift over of said stock, now ever take effect?

The provisions of the *will*, if construed in their natural sense, contemplate a survivorship among the three blind children, only upon the happening of both of two events, *i. e.* (1) If either of the said children should die under age, and (2) if either of the said children should die unmarried. Both John and Elizabeth are dead, and both died without having been married; but neither of them died "under age." One of the events not having happened, the inevitable conclusion from the natural construction of the will is that the gifts over to the survivors or survivor never took effect, and that, therefore, the estates of John and Elizabeth in said stock

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were never divested under the provisions of the will considered by itself, in favor of the survivors or survivor.

In the codicil of the will, the testator has expressed certain other contingencies for the divesting of the estates of said primary legatees, and has further provided that "if all the said children should die under age and without issue then the stock shall go to the testator's children, or their representatives." Taking these provisions of the will and codicil together, the intention of the testator to provide for these three blind children, and the survivor of them, in exclusion of all other persons, is plain. In the will proper, the testator has provided that unless these children shall each reach the age of maturity, when they would be likely to intelligently dispose of their interests, or shall be married, and so have a wife or a husband to take the benefit of their estates, the interests of any of said legatees dying, shall go to and vest in the survivors or survivor. And in the codicil itself, the testator has provided that the estates of these primary legatees shall not be operated upon by the gift over, except upon the death of *all* such legatees under age and without issue. Taking the natural reading of the will and codicil, the gift over to the children of the testator takes effect only upon the happening of both of two events: (1) The death of all the said primary legatees under age, and (2) the death of all of them without issue. As a matter of fact, none of the said legatees had, or so far have had, issue, but all of them passed the age of maturity, and one still lives at the age of fifty years. One of the two contingencies,

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to-wit, all dying under age, not having happened, the gift over has never taken effect.

From the very nature of the limitations, naturally construed, and the state of the admitted facts, the gift over can now never take effect, nor the estates of the three blind children ever be divested, because none of such children died "under age."

When recourse is had to authorities, the conclusions drawn from the natural and literal reading of the clauses of the will in question are reinforced and established.

A contention that the gift over to the survivors or survivor of the blind children took effect upon the deaths of John and Elizabeth, must be based upon the change of the copulative "and" in the phrase "if either of said children should die under age and unmarried" into the disjunctive "or," so that it would read "under age or unmarried;" and a contention that the gift over to the children of the testator, or their representatives, may yet take effect upon the death of George U. Reybold, without issue, must also be based upon the change of the copulative "and" in the phrase "if all the said children shall die under age and without issue" into the disjunctive "or," so that it would read "under age or without issue."

The language of a testator will not be altered by construction, unless it is very clearly apparent on the face of the will, not only that he has used the wrong word or phrase to accurately convey his meaning, but also what is the right one. *Marshall et al. v. Rench et al.*, 3 Del. Ch. 239, 257; *Kean's Lessee v. Hoffecker*, 2 Harr. 103, 115; 2 *Jarman on Wills*, 80; *Maddison v.*

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Chapman, 3 DeG. & J. 535; Usher v. Jessep, 12 East, 288; Davy v. Bumsall, 6 Term Rep. 34; Coates v. Hart, 3 DeG., J. & S. 504, 516.

The word "and" will generally not be construed disjunctively when such construction will defeat a previously vested gift. 2 Jarman on Wills, 102, and cases following.

When, in a will, the divesting of an estate upon a gift over depends on the happening of two or more events, one of which is the death of the legatee under age, and another the failure of such legatee to have issue, or an object who might take a benefit through such legatee if the interest of such legatee remained undevested, the gift over will not take effect, nor will the estate be divested except upon the happening of both or all of such events. 2 Jarman on Wills, 83, 100, 102; Everett v. Cooke, 7 East, 269; Usher v. Jessep, 12 id. 288; Davy v. Bumsall, 6 Term Rep. 34; Maddison v. Chapman, 3 DeG. & J. 535; Coates v. Hart, 3 DeG., J. & S. 504, 516; Baldwin v. Rawding, 2 B. & Ald. 441, cited 2 Jarman on Wills, 100; Framlingham v. Brand, 3 Atk. 441; Malcom v. Malcom, 21 Beav. 225; Walsh v. Peterson, 3 Atk. 193; Cheesman et al. v. Watson, 8 How. 263; Butterfield v. Haskins, 33 Me. 392; Abrahams v. English et al., 2 Harr. (N. J.) 288; Nevison v. Taylor, 3 Halst. 43; Roosevelt v. Thurman, 1 Johns. Ch. 220, 227; Carpenter v. Heard, 14 Pick. 449; Chrystie v. Phyfe, 19 N. Y. 344.

This rule of construction is so well established that the word "or" will be construed as "and" to effectuate the same. 2 Jarman on Wills, 82, etc., and cases cited;

Argument for complainant.

Harris v. Taylor, 2 South (N. J.) 413; Fairfield v. Morgan, 2 B. & P. (N. R.) 38; Eastman v. Baker, 1 Taunt. 174; Right v. Day, 16 East, 67.

III. In whom is the beneficial interest in said bank stock now vested?

Granting that at the times of the deaths of John and Elizabeth, their interests in said stock and note were indefeasibly vested in them, according to the conclusions heretofore reached, the present entire beneficial ownership of this stock and note is certain. By the will of John, his entire interest is vested in George U. Reybold, the complainant. The share of Elizabeth, upon her decease intestate, descended to her two brothers, of the whole blood, and next of kin, the said George U. Reybold, and the said Clayton B. Reybold. At present, therefore, George U. Reybold owns a five-sixths interest, and Clayton B. Reybold a one-sixth interest in said stock and note.

IV. Should this court now terminate the trust of this property, and order the present trustee to assign said stock and note to the persons now beneficially interested?

Two reasons are apparent on the face of the will for the creation of the trust of this stock: (1) To secure the safety of the property, and the maintenance and education of the blind children during their minority; (2) to protect the gifts over to the survivors or survivor of the blind children, or to the children and their representatives of the testator. Both of said reasons were fulfilled and failed when the youngest blind child became of age.

Argument for complainant — Opinion.

No ulterior facts and no reasons for the continuance of the trust are suggested in the answer of any respondent in this case.

The reasons for the continuance of the trust having failed, it should regularly be brought to an end. 3 Jarman on Wills, 70, 71, 52, note; Bispham's Equity, 80-82; Bowditch v. Andrew, 8 Allen, 339; Culbertson's Appeal, 26 P. F. Smith (76 Penn. St.) 148; Hill on Trustees, *236, note 2.

Upon the termination of a trust of personalty, the absolute estate therein is in the persons entitled to the use, and delivery or assignment should be made by the trustee to those beneficially interested. Bispham's Equity, 82; Hill on Trustees, *236, note 2.

Bradford & Vandegrift, Thomas Davis and William S. Hilles, for respondents.

WOLCOTT, CHANCELLOR.— Let the decree be entered as follows:

And now, to-wit, this 9th day of May, A. D. 1893, the above cause having come on to be heard before the Chancellor, upon argument of counsel and upon a mature consideration thereof, it appearing to the Chancellor that of the three blind children of John Reybold, Sr., John Reybold, Jr., died at the age of twenty-four years, unmarried and without issue, having willed his entire estate to George U. Reybold, said complainant, and that Elizabeth Reybold died at the age of forty-seven years, unmarried, without issue and intestate, leaving as her only heirs-at-law George U. Reybold and Clayton B. Reybold, and that George U. Reybold hath

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attained the age of fifty years, and is the only survivor of said three blind children; that the estates of said three blind children in said bank stocks became, immediately upon the death of Philip Reybold, Sr., a vested estate, subject to be divested in favor of the survivors or survivor of said blind children, upon the death of any of them, under age and unmarried, or in favor of the children, or their representatives, of the said Philip Reybold, Sr., deceased, upon the death of all of said blind children under age and without issue; and that all of said blind children, having survived to the age of twenty-one years and upwards, the said gifts over of said stock, upon the happening of said events, can now never take effect; and that at the time of the deaths of John Reybold and Elizabeth Reybold, they owned their respective shares of stock by an absolute and indefeasible title; and that by virtue of the premises, the said George U. Reybold is now entitled to have five-sixths of said bank stock and note, and said Clayton B. Reybold is entitled to have one-sixth of said bank stock and note.

And it further appearing that the said Clayton B. Reybold is administrator of the estates of John Reybold, Jr., and Elizabeth Reybold, and as such is primarily entitled to have and to hold for distribution the shares of said bank stock and note to which the said John and Elizabeth died entitled.

And it further appearing to the Chancellor that the reasons for the creation of said trust, by said testator, and for the further continuance of the same, have been now fully fulfilled, and have now failed, and that no ulterior facts and no reasons for the continuance of the

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said trust are suggested in the answer of any respondent in this case, and no such facts or reasons now appearing to the Chancellor.

And it further appearing that all persons and estates interested in the question proposed by said bill are before the court and have filed answers fully admitting the facts set forth in said bill, and submitting themselves to the decree of the Chancellor.

Now, therefore, It is ordered, adjudged and decreed by the court that the said trust originally created of said Delaware City Bank stock be and the same is hereby terminated and brought to an end; that the said Edwin C. Reybold, trustee, is ordered to file his account in this court within ten days from the date hereof, and thereupon to assign, transfer and set over unto the said George U. Reybold an equal one-third of the said stock and note, in his own right, and to the said Clayton B. Reybold, administrator of Elizabeth Reybold, deceased, an equal one-third of said stock and note, as administrator as aforesaid.

And upon the assignment of said interests in said bank stock and note to the parties aforesaid, it is hereby ordered, adjudged and decreed that the said Edwin C. Reybold, trustee aforesaid, together with the sureties upon his bond, be fully discharged from all responsibility and liability under said trust; and it is further ordered, adjudged and decreed that the costs of said bill, answers and proceedings in this court, thereunder, be paid by said trustee before the filing of his account, as aforesaid, out of the income of said stock and note, now in his hands, and the said costs are hereby taxed at the sum of \$101.17.

Syllabus.

In re CHARLES HARRIS, a Supposed Insane Person.

Kent, September Term, 1893.

Lunatics — jurisdiction of Chancery over; Restraining order — over property and person of alleged lunatic during interval between issuance and execution of lunacy proceedings; Petition for restraining order over alleged lunatic's property — practice in.

1. The Court of Chancery in this State, by special legislative grant, has jurisdiction of alleged lunatics from the very inception of the process by which their sanity or insanity is finally and definitively ascertained; and has the power to suspend or supersede the control of the supposed insane person over his property during the interim between the granting and the execution of the writ of insanity.
2. During lunacy proceedings, the presumption of sanity must remain in abeyance so far as it relates to the temporary restraint of the personal liberty and property of the supposed insane person.
3. When petitioned to restrain a supposed insane person from control over his property during pendency of lunacy proceedings, the Court of Chancery should not examine into the case more than is necessary to move it to grant the order for the protection of the alleged lunatic's person and estate; and, therefore, counter affidavits, negating the allegations contained in the sworn statements of the petitioner, will not be heard.
4. The petition for a restraining order is but collateral to the proceedings in lunacy, and dependent upon it for its foundation, and the affidavits upon which the lunacy proceedings are founded may be used in aid of this application.

Syllabus — Statement — Opinion.

5. The statement in the petition for a restraining order during the pendency of lunacy proceedings, supported by affidavit, that respondent has parted with large sums of money without receiving a visible equivalent therefor, will prevail against an answer which denies the respondent's mental incapacity, and his being under the influence of any persons for any purpose whatever, but does not specifically deny that statement in the petition; and is *prima facie* evidence of the incompetency of the respondent to govern himself and manage his estate, and justifies the Court of Chancery in granting such order.

PETITION for provisional order pending proceedings in lunacy.

The facts are fully stated in the first portion of the opinion of the Chancellor.

Nathaniel B. Smithers, Edward Ridgely, James Pennewill and James H. Hughes, for petitioner.

John B. Penington, W. C. Spruance, E. G. Bradford, L. C. Bird, for Charles Harris.

WOLCOTT, CHANCELLOR.—Sarah D. McPhail on the 2d day of October, A. D. 1893, presented a petition as the niece of Charles Harris of the Town of Dover in Kent County, and the State of Delaware representing that he was insane, and by reason thereof wholly unfit to govern himself or manage his estate, and praying that a writ may be issued to inquire into the same by a jury. To this was annexed her affidavit as to the truthfulness and correctness of the allegations therein set forth as were also the affidavits of Doctors Wilson and Downs in

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which they declared that they were both acquainted with the said Harris, and to the best of their judgment and belief he was insane and narrated the facts and circumstances by which such unsound state of mind was rendered manifest. On the same day the Chancellor ordered a writ *de lunatico inquirendo* to be issued in accordance with the prayer of the petitioner directed to the sheriff of Kent County returnable at chambers, December 7, 1893.

On the 20th day of October, A. D. 1893, the said Sarah D. McPhail as the niece and one of the nearest blood relations of the said Charles Harris presented another petition, reciting therein the said proceedings in lunacy and alleging: First, That he is the owner of a large personal property, consisting of bonds, stocks and other securities, which he has for more than twenty years kept in the custody of The Fidelity Insurance, Trust and Safe Deposit Company of the City of Philadelphia, in whose management he has had the most implicit confidence. Second, That notwithstanding such confidence the said Harris was recently induced by those with whom he is exclusively surrounded to take means to withdraw his effects and papers from the said company and to that end had executed one or more letters of attorney. Third, That he is in the exclusive control and keeping of persons who have by reason of his mental and physical incompetence acquired absolute dominion over him and who are seeking through the influence thus acquired to obtain possession of his estate and effects for their own private purposes, and who have already by the

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same means succeeded in obtaining from him large sums of money to the extent of several thousand dollars for their own private uses and who will continue to do so to the waste and destruction of his estate unless a provisional order should be made restraining the control of the said Harris over his property pending the said insanity proceedings.

The respondent, by his solicitors, on the 25th day of October, A. D. 1893, on the day set for the hearing, filed an answer under oath to the last-named petition, in which he admitted all the facts set forth therein in relation to the stocks, securities, etc., owned by him and then being kept by him in the Fidelity Insurance, Trust and Safe Deposit Company of the City of Philadelphia, but denies that it ever had the management thereof. He also admits or avers that after full consultation with his counsel alone, on the 2d day of October, A. D. 1893, he instructed them to prepare a letter of attorney authorizing and empowering the Equitable Guarantee and Trust Company, a corporation of the State of Delaware, to receive from the Philadelphia Company all his personal effects in its control and to invest in such good and safe securities as said attorney should deem proper, all moneys belonging to the principal of his estate, which it might receive. He further says that the instructions thus received were embodied in a letter of attorney and by him executed the following day, which with the key to the deposit box was delivered to the said Delaware Company. He alleges as a reason for this action his advanced age and physical infirmities

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and the annoyance to which he had been recently subjected by reason of certain litigation in the State of Pennsylvania respecting his said property, deposited as aforesaid with said Philadelphia Company, and also his desire of having his property brought into Delaware where he resides and expects to reside during the residue of his lifetime, so as to avoid the expense, delay and complication in the settlement of his estate in Pennsylvania in case he should die leaving said property in the custody of said company. He denies that he has since the commencement of the said proceedings in insanity executed any letter of attorney other than the one before mentioned, or that any other letter of attorney whatsoever executed by him is now held by any person or corporation. He also denies that he was ever induced under the influence of any person or persons to withdraw all his effects from the said Philadelphia Company, and avers that said letter of attorney was his voluntary act and was made by him with the approval and under the advice of his counsel. He also disclaims any desire or intention to revoke said letter of attorney or to make any other except so far as may be necessary to execute the powers intended to be conferred upon the said Delaware Company. The respondent also avers that there is no reasonable ground to apprehend that any loss, waste or injury to his estate will occur during the pendency of the said proceedings in insanity or at any other time by reason of the said letter of attorney. He denies that he is mentally incapable of governing himself or managing his estate or that he is or has been in the custody, control or keeping of any person or

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persons whatsoever, or that any person or persons has or have acquired dominion or undue influence over him for any purpose whatever.

I have stated the facts quite fully as shown by the petition and answer in order that the points of agreement and disagreement between the two may the more clearly appear and the weight of the facts be more correctly estimated.

The question to be determined is whether the relief prayed for should be granted in the light of the foregoing statement of facts. The object sought to be attained by the petitioner is to hold the property of the alleged lunatic *in statu quo* until the termination of the proceedings in lunacy previously instituted. That the power to do this, or something which would be substantially the same, resides in this court when a proper case is presented has ceased to be a subject about which there can be any serious controversy. Chancellor Kent, *In re Wendell*, 1 Johns. Ch. 600, and Chancellor Williamson, *In re Dey*, 1 Stockt. 181, of this country; and Lord Eldon, in the case of *Ridgeway v. Darwin*, 8 Ves. 66, and Hargrave, *In re Heli*, a lunatic, 3 Adk. 634, in England, unequivocally recognized this doctrine to the extent in which it is claimed in this case. But it does not depend upon the authority of adjudged cases, for it is founded on the authority of reason as well as precedent.

If there were no power to suspend or supersede the right of a person, supposed to be of unsound mind, to manage and control his property during the interval between the issuance and execution of a writ of in-

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sanity, it would many times partially, if not wholly, fail of its purpose, for during that time he might waste, squander, destroy, or otherwise dispose of it, especially if it consisted of bonds, stocks, securities and certificates of indebtedness which pass by delivery or assignment. After the waste or destruction of his property, of what use would it be to prosecute the writ to a finality and obtain the appointment of a trustee, the medium through which the court exercises a permanent control over the person and property of those who have been adjudged to be *non compos mentis* by due course of law. Clearly none, so far as the preservation of his estate is concerned, if it consisted of personal property, for it would be out of reach of the trustee or placed in a situation that would make restitution impossible without protracted and expensive litigation.

While it is true that this court, by virtue of its inherent and general powers, can take cognizance of the acts and persons by which the alleged lunatic may be fraudulently and unfairly deprived of the possession of his property, it goes without saying that such a remedy is manifestly inadequate, not to say in many cases absolutely fruitless.

A preventive remedy, when it can be employed, is more effectual for the protection of human rights than one which is merely corrective in its operation and effect. The former stands between the wrongdoer and those who are liable to become his victims, the latter simply proposes to restore that which has been taken or to imperfectly compensate in damages for the loss or injury sustained. The old adage, "an ounce of pre-

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vention is worth a pound of cure," illustrates with peculiar force the relative or comparative efficiency of these remedies as applied to persons whose mental condition is in progress of judicial inquiry. It was urged by one of the solicitors for the respondent that as the English Court of Chancery had no jurisdiction over the persons and property of nonadjudged lunatics, as such, and as the Chancellor of England had jurisdiction only of that class of persons as the representative of the King, as *parens patriae*, by means of his sign-manual, the Chancellor of this State, whose general powers are inherited from the English Court of Chancery, cannot, by virtue thereof, assume the care and supervision of such persons unless brought within one or more of the well-recognized heads of equity jurisdiction. This is true. Neither does the Court of Chancery in this State possess this special authority as a part of its original, inherent, equitable jurisdiction. It is derived from the legislature just as the Chancellor of England derived it from the King by virtue of his sign-manual. This court occupies the same relation, under chapter 49 of the Revised Code, to those persons who are *non compos mentis*, as the representative of the people, as the Chancellor of England does to the same class of persons within his jurisdiction, as the delegate of the Crown, so that the proceedings to inquire into the alleged insanity of any person are not instituted in this State by the Chancellor, by means of a special power not included in the general powers of his office, as it is in England, but by the Court of Chancery itself by a direct legislative grant. Therefore, the Court of Chancery

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assumes jurisdiction of alleged lunatics who have not been so adjudged from the very inception of the process by which their sanity or insanity is finally and definitely ascertained. This view of the matter strengthens rather than weakens the position already taken, for, as just observed, this power is conferred upon the court and not devolved upon the Chancellor in the nature of an *ex-officio* duty. While this court, under the provisions of the statute just referred to, cannot assume the permanent and exclusive custody of a supposed insane person until he is so found by a jury, yet he is in a limited sense during the pendency of lunacy proceedings, its ward, around whom it is bound to throw the arm of protection. For persons, thus situated, if insane, that is not unfrequently one of the most critical periods during the continuance of their mental disorder in which the most unremitting vigilance is necessary for the protection especially of their estates. And if the court is powerless to act, however apparent and imperative the necessity, the legislature would stand convicted of the folly of conferring jurisdiction over a matter, and at the same time withholding the means of executing the beneficent purpose for which it was given.

It will not do to say that the presumption of sanity stands in the way of the exercise of this humane power, for it, like the presumption of innocence, must sometimes remain in abeyance so far as it relates to the temporary restraint of personal liberty, the one for the good of the person, the other for the good of the people, before either shall have been rebutted by the production of satisfactory and competent evidence.

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But two of the solicitors for the respondent admit the existence of such a wise, conservative power, but they strenuously deny that such a case has been presented as to provoke or call it into activity. They insist that something more than the bare allegations of the petitioner, supported by her affidavit, is necessary to justify the affirmative action of the court in respect to her prayers and requests, namely, the production of additional and corroborative affidavits. They further intimate that the respondent should have the privilege of submitting counter affidavits negating the allegations contained in the same sworn statements of the petitioner.

Such a course would necessarily raise an issue of fact involving the mental capacity of the alleged lunatic and necessitate the decision of the very matter which the sheriff is commanded to inquire into by the oaths of twelve good and lawful men. To weigh testimony submitted on both sides, whether it be much or little, and then decide according to the preponderance thereof, would be assuming the functions of the jury and determining in advance the issue of fact which the law has wisely confided to their judgments.

The controversy out of which this application grows should not be subjected to examination any more than is necessary to move the court to grant an order for a writ of insanity and such other orders that look to the protection of the alleged lunatic's person and estate. Each party has a right to insist that his or her status before the jury shall not in anywise be affected by any

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decision that may be made by this court in any intermediate or preliminary proceeding. A cautionary step like this, intended only for the preservation of the alleged lunatic's property, should not, in my opinion, be allowed to take on the character of an adverse proceeding, for if it were it would inevitably end in the decision of a question forbidden by both the letter and spirit of the law.

Since, then, the power to suspend or supersede the control of a supposed insane person over his property *ad interim* is lodged in this court, the next inquiry that naturally arises is, what amount of *ex parte* proof or authenticated facts is necessary to call it into exercise?

The solicitors for the respondents contended that the petition and affidavits upon which the proceedings in lunacy were grounded are no part of this proceeding and though matters of record in this court they could not be used in support thereof. The latter is but an incident or outgrowth of the former, and, therefore, has no independent origin or existence. It has all the characteristics of a dependent or secondary life. If there had been no writ of insanity this application would have no foundation and the petitioner would have no standing in this court. And any order that may be made now will *ipso facto* determine with the return and confirmation of the inquisition. The same result would follow in case the writ at any intermediate stage should be quashed or otherwise suppressed. If this proceeding is only subservient to and dependent upon the other proceeding and through it derives its vitality from the same conditions I can see no reason why the affi-

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davits upon which it is founded cannot be used in aid of this application.

While the allegations contained in those affidavits, assuming them to be true, only prove the incapacity of Mr. Harris to govern himself or manage his estate or a condition of mind that renders him susceptible to the alleged overmastering influences which constitute the ground of the petitioner's fear and complaint, yet it is a fundamental fact that must appear by *ex parte* proof as *prima facie* true before the petitioner could be heard at all upon this or a similar application. Whether or not some proof outside of the petitioner's affidavit should have been made as to the extent of such influence and the exercise or attempted exercise thereof for a dishonest and fraudulent purpose in order to obtain the desired relief, it is not necessary for me now to decide. "Sufficient unto the day is the evil thereof." The allegation of the petitioner in regard to the wrongful getting of a part of the respondent's money is for the purposes of this case practically admitted to be true by his irresponsible and evasive answer in respect thereto. It is alleged in the petition "that the mental and physical condition of the said Charles Harris is such as that he is wholly incapable of governing himself or managing his estate; that he is in the exclusive control and keeping of persons who have acquired absolute dominion over him and who are seeking, through the influence they have acquired over him, to obtain possession of his estates and effects for their own private purposes and who have already succeeded in obtaining from him large sums of money to the extent of several thousand dollars."

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This is a very material allegation which could not have failed to challenge the attention of respondent's solicitors, and to avoid the effect of admitting the truth of any part thereof it should have been explicitly answered by an express denial in every particular or by way of confession and avoidance. The answer fully denies every essential part of the allegation except that which relates to the obtaining from the respondent large sums of money by the persons with whom he is surrounded. To this the answer is wholly silent or irresponsible. Silence or evasion as to a material allegation in a bill or a petition of this kind is always construed into an admission of its truth. It may be urged that the denial of the respondent's mental incapacity to govern himself or manage his estate, and of his being under the control, influence or dominion of any person or persons for any purpose whatever, deprives the act of obtaining money from him of any wrongful or immoral significance. This would be true if his mental faculties possessed their usual vigor. He would then have a right to do as he pleased with his money without interference from any quarter whatever. But the affidavits, which are a part of this case, allege an entirely different state of facts which must prevail against the allegations in the respondent's answer, where there is a material conflict. Now, the *prima facie* incompetence of the respondent to govern himself and manage his estate in connection with the fact that he has parted with several thousand dollars without receiving a visible equivalent therefor, justifies this court in granting an order suspending his control over his property until the return and confirmation of the inquisition in lunacy.

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Before closing, however, I desire to say that the conclusion at which I have arrived cannot in any way be construed as an expression of a lack of confidence in the integrity or prudence of the counsel for Mr. Harris in advising the execution of the letter of attorney constituting the Equitable Guarantee and Trust Company his attorney in fact or in any other respect. I have no doubt that they have been sincere in all that they have done, and if the letter of attorney were irrevocable the securities would be perfectly safe in the hands of said company, but the recognition of the power to make such an instrument would be a recognition of the power to take it at any time and to execute to another, thus having the funds or securities of the respondent exposed to the danger of loss or destruction apprehended by the petitioner.

Syllabus.

THE MAYOR AND COUNCIL OF WILMINGTON, a Municipal Corporation of the State of Delaware, at the Instance of JOSEPH L. CARPENTER, JR., J. NEWLIN GAWTHROP and SAMUEL CHAMBERS, the Board of Directors of the Street and Sewer Department for the City of Wilmington, v. JOHN EDWARD ADDICKS, JOHN G. BAKER, FREDERICK P. ADDICKS, SIMON B. CONDE and SAMUEL AUSTIN.

New Castle, September Term, 1893.

Injunction; Parties; Demurrer.

1. It is a well-established and undoubted rule in equity proceedings, that all persons materially interested, should be parties to the suit, either as complainants or defendants, in order that the court may determine the rights of all parties interested in the subject-matter of the suit, and make a complete decree.
2. It is undoubtedly true that whenever a want of proper parties appears on the face of a bill, the proper mode to take advantage of this objection is by a demurrer.
3. A statement in the bill of the existence of a party, coupled with an express denial of the existence, is not a fatal admission on a demurrer for want of parties. If defendants rely upon such actual existence, a different mode of pleading must be adopted.
4. A demurrer to a bill admits to be true all the facts as therein set forth.
5. The mayor and council of Wilmington, at the instance of the individual members of the board of directors of the street and sewer department of said city, filed a

NOTE. - The Chancellor having been counsel for respondents before his appointment as Chancellor. In matters respecting this suit, upon his application to the Governor for the appointment of a Chancellor ad litem, H. R. Johnson was appointed to try this case.

Syllabus — Statement — Argument.

bill to enjoin certain individuals from opening the streets of said city, to lay gas pipes, without the previous consent of said board. Defendants demurred on the ground that the bill alleged that said defendants were acting as officers and agents of the Oxy-Hydrogen Company, of this State, and that, therefore, said company should have been made a party defendant. Held, that the demurrer must be overruled, for the reason that the bill only stated that individual defendants claimed to act as such officers and agents and expressly denied the actual existence of said company; and that the demurrer, admitting all the facts in the bill, admitted the truth of such express denial of the actual existence of such company; that if the defendants relied upon such actual existence, they should have adopted some other mode of pleading.

INJUNCTION BILL.—Bill filed by the mayor and council of the City of Wilmington, at the instance of the members of the board of directors of the street and sewer department, against John Edward Addicks, John G. Baker, Frederick P. Addicks, Simon B. Conde and Samuel Austin, to enjoin said defendants from opening the streets in the City of Wilmington and laying gas pipes therein, without permission being first had and obtained from the said board of directors of the street and sewer department.

William C. Spruance and Edward G. Bradford, for the complainant.

The demurrer is filed because, as it is claimed, an alleged company called the Oxy-Hydrogen Company has not been made a party defendant.

Argument for complainant.

The demurrer should be overruled in the first place because it is what is known as a "speaking demurrer."

It assumes as facts matters that are not set forth in the bill.

Such matters can only be brought forward by way of plea or answer.

1. The demurrer assumes what nowhere appears in the bill, namely, that what is termed the Oxy-Hydrogen Company has not only such an existence, but also such an organization as would render it capable of being joined as a party defendant.

(a) The demurrer sets forth that it is stated in the fifth paragraph of the bill that "said Oxy-Hydrogen Company of the State of Delaware, by its counsel, had notified the board of directors of the street and sewer department that it was its intention on the 31st day of March, A. D. 1891, to begin laying gas pipes in the streets of the said City of Wilmington."

There is no such statement in the bill. In the eighth paragraph thereof it is stated that "no legal or valid organization of said company has ever been effected;" and in the fifth paragraph it is stated that "the said board of directors of the street and sewer department on the 30th day of March, A. D. 1891, was notified in writing by the counsel of certain persons designated as the Oxy-Hydrogen Company of the State of Delaware that it was the intention of the said alleged company on the day following, to-wit, on the 31st day of March, A. D. 1891, to begin the laying of gas pipes in the streets of said city."

Argument for complainant.

(b) The demurrer sets forth that by section 6 of the bill "it is further alleged that the present defendants claim to be officers, servants and agents of said company in the opening and excavation of Liberty street in said city as therein set forth."

There is no such statement in the bill. The bill sets forth in paragraph 6 that "the said defendants John Edward Addicks, John G. Baker, Frederick P. Addicks, Simon B. Conde and Samuel Austin, together with sundry other persons to your orators unknown, claiming to be officers, servants or agents of said alleged Oxy-Hydrogen Company of the State of Delaware," etc.

(c) The demurrer sets forth that by paragraphs 7 and 8 of the bill "it appears that said company was incorporated by an act of the General Assembly of the State of Delaware, a copy of which act is to said bill attached, and that said defendants claim to be acting thereunder."

This is a misstatement of the allegations of fact referred to. The bill in the eighth paragraph denies that the said alleged Oxy-Hydrogen Company has ever had a legal or valid organization, and in the seventh paragraph alleges that the "defendants claim and pretend that they were and are authorized and empowered to so enter upon, open and excavate any and all streets of said city for the purpose of laying gas pipes therein under and by virtue of the charter of the said alleged Oxy-Hydrogen Company of the State of Delaware," etc.

(d) In the demurrer it is alleged that by paragraph eight of the bill it appears "that the organization of said company is called in question by said complainant."

The bill in paragraph 8 expressly denies that any

Argument for complainant.

legal or valid organization of the alleged company has ever been effected.

The demurrer should, therefore, be overruled as a "speaking demurrer." Story's Eq. Pl., § 448; 1 Dan. Ch. Pl. & Pr. *656.

2. The demurrer should be overruled because it admits that the alleged Oxy-Hydrogen Company has no right to tear up the streets of Wilmington, or to do what the defendants have been restrained by the injunction of this court from doing.

The bill sets forth in the eighth paragraph of the stating part that "no legal or valid organization of said company has ever been effected."

This admission is made by the parties demurring, and yet with apparent seriousness they contend that the alleged company should be made a party in order to be heard upon the question whether or not it has the right to tear up the streets of Wilmington.

It cannot be seriously contended that a company which has never had a valid or legal organization has the right to carry on its business.

Yet the tearing up of the streets of Wilmington for the laying of gas pipes would constitute the carrying on of such business.

The demurrants have, therefore, admitted by their demurrer that the alleged Oxy-Hydrogen Company has no right whatever to interfere with the streets of Wilmington; but notwithstanding this admission, which is conclusive for the purpose of the disposition of this demurrer, they contend that the alleged company should be made a party in order that it may be heard upon

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the question of its right to do what the demurrants have thus solemnly admitted it has no right whatever to do.

It is difficult to conceive of any process of reasoning or principle of logic which would require this court to uphold the demurrants in such an impossible and inconsistent position as they have assumed.

In one breath they claim that the alleged Oxy-Hydrogen Company is entitled to be heard upon the question of its right to interfere with the streets, and also solemnly and conclusively admit that the said alleged company has no right whatever to dig up the streets.

It is well nigh impossible to elaborate argument to show more clearly the absolute unsoundness of the argument made in support of the demurrer.

3. This is not a case in which an effort is made to collaterally question the existence or organization of a corporation; nor a case of suit brought by or against a corporation upon a contract; other principles would apply in such a case.

But here certain individuals claiming to act as the agents of an alleged corporation seek to justify their action under the alleged authority of the corporation.

The city clearly has just as much reason and right to question the right as would a private individual whose real estate is threatened to be permanently injured and virtually appropriated under the alleged authority of a corporation.

If the corporation has no right to carry on its business involving the appropriation of streets of the city, it necessarily follows that the city can protect itself against the exercise of any such alleged rights upon

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the ground that there is no power in the alleged corporation to do the act threatened or complained of.

Therefore, the utter want of a legal or valid organization is an absolute answer to the claim of any authority to do the act.

And this want of authority can be questioned by the city. New York Cable Co. v. Mayor, etc., of New York, 104 N. Y. 1, 38, 43; Brooklyn Steam Transit Co. v. City of Brooklyn, 78 id. 524, 531; Dillon on Municipal Corporations, § 701, note.

The authorities show that the organization of a corporation in order that it may carry on business must be *de jure* as well as *de facto*.

But in this case all doubt whatever as to the proper disposition of the demurrer is removed by the solemn admission that the alleged Oxy-Hydrogen Company has never had a legal or valid organization, and, therefore, necessarily that it has never had the right to carry on business or do the acts complained of.

This admission having been made, it is the height of absurdity that the persons making the admission should object to the bill because it does not give an opportunity to the alleged company to have the court decide whether or not it could do what the demurrants have admitted it cannot do.

The cases cited by the counsel on the other side in which it was held necessary to join corporations as parties defendant were cases in which it appeared upon the face of the bill or otherwise in the case that such corporations had a valid existence and organization, and have no bearing upon the case now under discussion.

Argument for complainant — Argument for defendant

An apparent exception was the case of *People v. Flint*, 64 Cal. 49; but that case clearly has no bearing upon the case now under discussion as it was virtually a *quo warranto* proceeding.

4. If the alleged Oxy-Hydrogen Company had been made a party defendant by the complainant, the complainant would have been estopped from denying the valid organization and legal existence of said company.

Yet the absence of a legal and valid organization is one of the grounds stated in the bill upon which the interference of the court is prayed, and upon which the complainant has a right to stand.

5. The defendants have prematurely presented to the court what may or may not be a proper subject for its consideration at a later stage of the case.

They may, and as they claim to be officers and agents of the alleged company, it is to be assumed that they have the ability, by plea or answer, to controvert the allegations of the bill as to the absence of a valid or legal organization of such company; and if such allegations can be successfully controverted, the court would then have full power to require the joining of the said alleged company as party defendant.

But this end cannot be accomplished by demurring to, the bill.

It is, therefore, respectfully submitted that the demurrer should be overruled.

Austin Harrington and H. H. Ward, for respondents.

All persons materially interested should be parties to the suit in equity, either as complainants or defend-

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ants, so that the court may determine the rights of all persons interested in the subject-matter of the suit and make a complete decree. *Bank v. Polk et al.*, 1 Del. Ch. 167, 174; *Martin v. Purnell, Exr., et al.*, 4 id. 249, 252; *Mitf. Pl.*, note, 398 (ed. 1849); id. 190, etc.; 1 *Dan. Ch. Pl. & Pr.* 246, 287, note 2, 190 and note 5.

It is incumbent upon the court in a proper case upon demurrer, or otherwise, to order proper parties made to record. 1 *Dan. Ch. Pl. & Pr.* 287, note 2, etc.

A corporation constitutes no exception from this general rule, and in order to make it a party, it must be sued in its proper corporate name. 1 *Dan. Ch. Pl. & Pr.* 143; *High on Injunctions*, § 781; *Binney's Case*, 2 *Bland*, 99; 4 *Am. & Eng. Ency. of Law*, 282, note 2, and 288, note 2; *Dodge v. Woolsey*, 18 *How. (U. S.)* 331; *People v. Flint*, 64 *Cal.* 49.

The Oxy-Hydrogen Company is not a party to this action, since no subpoena is prayed against it. 1 *Dan. Ch. Pl. & Pr.* 286, and note 4.

For some reason, there appears to have been an attempt to avoid making the "Oxy-Hydrogen Company of the State of Delaware" a party defendant. See paragraphs 5, 6, 7, 8, 9, 10, 13, of the stating part of the bill of complaint, and section 2 of the prayers of said bill.

But the very allegations of fact which the complainants found it necessary to make to set out their case, and even to accomplish their overstrained purpose to save themselves the necessity of making the "Oxy-Hydrogen Company" a party defendant, have irretrievably drawn said company into the case, and must

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compel the making of said company a party defendant, both because it appears to be vitally interested in the subject-matter of the suit, and for the purposes of an adequate decree. *People v. Flint*, 64 Cal. 49.

No trick of phraseology can prevent a court of equity from looking at the real state of facts, and the intention and purposes of the parties complainant to a suit. The mere use of the word "alleged," whenever reference is made throughout the bill of these complainants, to the Oxy-Hydrogen Company, does not cover up the actual existence of this company. The bill itself sets forth that the defendants claimed to be acting as agents of such a company. The act of incorporation of this company is made a part of the bill of complaint. An organization *de facto* of the company is not denied; the only denial of organization being that the company has no valid and legal organization. In no portion of the bill do the complainants go so far as to deny the existence of the company.

If, upon the papers in the case to this point, and upon the argument of counsel for both sides, the court are of the opinion that the Oxy-Hydrogen Company must, at some stage of the case, in order to do justice to all parties concerned, and to make a complete decree, be made a party defendant to the record, the court may, at this stage, and upon this demurrer, order that to be done.

The complainants have found it necessary in their bill of complaint to put in issue:

(1) The legal organization of the company. See §§ 8 and 9 of the bill of complaint.

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(2) The powers and authorities, and the extent thereof, possessed or claimed to be possessed by the company, under its charter of incorporation. See §§ 7, 8, 9 and 10 of the bill of complaint, and § 2 of the prayers of said bill.

Without a determination of these two issues of fact and law by the court, the court cannot reach any conclusions upon the equities of the bill, or make any decree; but the court should not render any decree involving a judicial determination upon these two points, without giving this company an opportunity to be heard as a party. Any decree otherwise rendered would be simply nugatory, and would, in no respect, bind the company or its agents. *People v. Flint*, 64 Cal. 49; *Binney's Case*, 2 Bland, 99.

The prayer of the complainant is that the court will enjoin these defendants, whom the bill avers to be alleged agents of the company, and all other persons claiming to be agents of the company. Since the Oxy-Hydrogen Company is not made a party and no injunction is prayed against it, the prayer to restrain persons claiming to be servants, agents or employees generally, of the said company, is manifestly wholly unwarranted.

As a general rule, only persons named as parties can be enjoined. By no possible stretch of power can the unnamed agent of a person not named as a party be enjoined. *High on Injunctions*, § 747; *Fellows v. Fellows*, 4 Johns. Ch. 25; *Iveson v. Harris*, 7 Ves. 256.

The common practice of this court to enjoin the unnamed servants, agents and employees of a party, is based solely upon the injunction granted against a party,

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as such, and is intended solely to prevent the performance by the party, by indirect means, of the matter or thing, which the party was expressly enjoined from doing.

As this action and its pendant injunction now stands, there is no reason why this company should not choose new officers or agents, proceed to dig up the streets of the City of Wilmington, until they should be newly enjoined upon a new bill filed; and if such new bill was modeled upon the present one, the company could again choose other officers and agents, and repeat the process; and so on forever. *Binney's Case*, 2 Bland, 99.

Only those persons named in the writ, and their agents having knowledge of the order, can be made liable for a breach of the mandate of an injunction. *High on Injunctions*, §§ 862, 859.

The defendants do not propose to combat, that, by demurring, they have necessarily admitted all the facts plainly and sufficiently pleaded in the bill of complaint, to be true. They are not content, however, to admit any extension of that rule of law, and desire to note that a demurrer does not admit either all conclusions of law, based upon facts sufficiently pleaded, nor all conclusions of fact, based upon facts sufficiently pleaded, to be true. These defendants have, therefore, by their demurrer, not admitted to be true, either that a corporation having no valid and legal organization, has, therefore, no organization; or that a corporation, having no valid or legal organization, does not exist for the purposes of this suit; both of which were conclusions

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drawn by the counsel for the complainant to their argument; but neither of which are sufficiently pleaded in the bill of complaint.

A corporation may have either a *de jure* organization or a *de facto* organization. A *de jure* organization must, undoubtedly, be the kind of organization, the existence of which, as to the Oxy-Hydrogen Company, is denied in the eighth and ninth sections of the bill of complaint, to-wit, a valid and legal organization. A *de facto* organization is none the less an organization, although it may be either formally or essentially defective in some particular. In a certain class of cases, such as *quo warranto* proceedings against a corporation for unauthorized assumption of corporate franchises, it may be necessary to plead and prove a *de jure* organization of such company; since, in such cases, the legal and valid formation and existence of the corporation are the essential facts at issue. But in all other cases, the *de jure* organization of the company is usually immaterial, and the validity and legality of such organization cannot be called in question, and, in such cases, a *de facto* organization is sufficient for all purposes. Morawetz on Corporations (2d ed.), § 37, and citations.

The proof of the existence of a corporation *de facto* is sufficient, if it be shown, first, that a charter or some law, under which a corporation with the powers assumed, might lawfully be created, exists; second, a user, by the corporation, of the rights claimed to be conferred by such charter or law; and irregularities in the organization of the company short of fraud, are not

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material. Morawetz on Corporations (2d ed.), § 777, and citations.

The face of the bill shows the existence of a charter or law, under which the Oxy-Hydrogen Company might lawfully be created; since that charter is expressly made a part of the bill of complaint. Notwithstanding the consummate art displayed in the draft of the bill of complaint, the complainant clearly shows a user by the Oxy-Hydrogen Company of the rights claimed to be conferred by that charter or law. An examination of the bill of complaint shows that it is clearly set out that the counsel for the Oxy-Hydrogen Company, on the 30th day of March, 1891, notified the street and sewer department of the City of Wilmington, in the name of said company, that said company proposed to proceed under their charter, and to begin work on the following day in laying gas pipes, under the provision of its charter.

In section 6 of the bill of complaint, it appears that these defendants, together with sundry other persons unknown, claiming to be officers, servants and agents of said "alleged" Oxy-Hydrogen Company, of the State of Delaware, did, on the following day, pursuant to the notice of said company, open and excavate a certain street of the City of Wilmington, known as Liberty street, for the purpose of laying gas pipes therein, and that down to the filing of the bill, they continued engaged in the opening and excavating of said street, for the purpose aforesaid; and that they threatened and intended to enter upon, open and excavate other

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streets of said city, for the purpose of laying gas pipes therein. By section 7, it appears that these defendants claimed and pretended that they were authorized and empowered to so enter upon and excavate any and all streets of said city, for the purpose of laying gas pipes therein, under and by virtue of the charter of the said "alleged" Oxy-Hydrogen Company of the State of Delaware, etc. By section 10, it appears, by necessary implication, that at the time of the filing of the bill of complaint, the said "alleged" Oxy-Hydrogen Company of the State of Delaware, had expended money in and for the prosecution of the business, for which said charter was granted. That it appears in other parts of said bill of complaint that the said "alleged" Oxy-Hydrogen Company was, in fact, through its agents and employees, in full swing of operations under its charter, and that this bill was filed for the sole purpose of restraining said "alleged" corporation from so acting by its agents and employees; and that all of the persons claiming to be agents and employees of said company, known to the complainant, were made parties to this bill of complaint, and an injunction prayed and secured against them. Stronger allegations and indications of user of the powers claimed by this company, under its charter set forth in the bill, can surely not be required than plainly appear upon the face of such bill and its exhibits. Thus, we see, that upon the face of this bill of complaint, both the charter and the user incontrovertibly are shown. But we are not left to deduction even from such plain premises as these, as to the existence of a *de facto* organization of this company; for,

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in section 13 of said bill of complaint, it appears that the complainant in this bill, on the 1st day of April, 1891, delivered copies of certain preambles and resolutions of the board of directors of the street and sewer department of the City of Wilmington, not only to the counsel of the said "alleged" Oxy-Hydrogen Company of the State of Delaware, but to John G. Baker, who claimed to be the president thereof. Either the service of that copy upon John G. Baker, who claimed to be the president of this company, was a legal and effective act, or it was merely nugatory and ineffective; but, for the purposes of this argument, we have a right to assume from the fact that the complainant has alleged the service of these copies, and devoted an entire section to this statement of the service of such copies, that such service so constitutes a material fact, and must be taken to be a recognition on the part of this complainant of the existence *de facto* of the Oxy-Hydrogen Company.

If this company appears upon the face of the bill and its exhibits to have a *de facto* organization and existence, all of the arguments, based upon the assumption that such company has no such existence whatsoever, fall to the ground. When we consider that, as appears by section 13, and by the date of the order of this court, that the copy of the above preamble was served upon John G. Baker, who claimed to be the president of this company, on the 1st day of April, 1891, and that the restraining order of this court was granted against these defendants on the 2d day of April, 1891,

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and that the bill of complaint was actually filed in this court upon the 1st day of April, 1891, we see how utterly fallacious the argument of the complainants is, that, because of the absence of a legal and valid organization, the corporation did not exist, and that, therefore, they could not know the name of the president, on whom to serve subpoena and injunction.

As to the "speaking" character of this demurrer, the defendants would say that upon the authority of the citations of law, made by the complainant in its argument before the court, upon this motion, it appears that if any portion of the demurrer is legally and properly expressed, that the "speaking" portion, if any, may be disregarded as surplusage; and that if there remains sufficient of the demurrer, properly phrased upon which a decree may be based, the presence of such surplusage is immaterial. Even the most cursory reading of the bill of complaint, and the demurrer, will show that the Oxy-Hydrogen Company. is a necessary party, and that sufficient properly-worded reasons appear in said demurrer. Taking the most extreme position of the complainants in their argument before the court, that all the operations, described in said bill, were performed and all of the notices, copies of preambles and resolutions, etc., were served by and upon private persons, who claimed to be officers, counsel, agents and employees of an "alleged" corporation, and who professed to be acting by the authority of, and in accordance with the powers and authorities in the charter of an "alleged" corporation, the defendants would argue that

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such corporation is so vitally interested in this suit, that its exclusion as a party could not be justified on the ground of injustice to it and its stockholders, and that the Chancellor could not make a complete decree, unless it were so joined. The mere fact that a corporation is alleged to exist, by any person, and that persons claiming to be acting as agents of it, constituted in one case, which we have cited to the court, a sufficient ground, why, upon a demurrer like this, such "alleged" corporation should be made a party defendant; and moreover, in that case, it appeared affirmatively upon the record, and after full and explicit proof upon evidence taken, that such corporation had, in fact, no legal existence whatever. *People v. Flint*, 64 Cal. 49.

We contend that the case now before your Honor is far within that case, since it is nowhere alleged on the face of this bill that the Oxy-Hydrogen Company does not exist *de facto*, but, on the contrary, its existence *de facto* doubly appears upon the face of this bill.

We would, therefore, conclude that as appears upon the face of this bill, that the legal organization of this company and its powers and authorities under its charter of incorporation, are questioned, and that this court must judicially pass upon the existence and powers of this company, in order to render a decision against these parties defendant, who, it is "alleged" in said bill, claimed to be acting merely as agents of this company, and in accordance with the powers of its charter, that this company is vitally interested in the subject-matter of this suit, and that the court cannot make a complete

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and conclusive decree without its joinder as a party defendant. That the court must pass upon the powers claimed in the charter of the Oxy-Hydrogen Company is evident, since an act of the Legislature is set up by the complainant, in opposition to the charter of this company, and the court is asked to decide that such act of the Legislature is paramount to the powers granted under the charter of this company.

Whether the Oxy-Hydrogen Company has or has not a "legal and valid" organization may be a question of interest later in the case, and whether it be a material point in this case that it has such an organization, will probably be hereafter fully discussed. But if, indeed, it be of such vital importance as the argument of the complainant would indicate, it is of sufficient importance so that it should not be determined without giving the company a chance to be heard, or without joining this company in this suit, so as to enable the Chancellor to make a decree, binding on this company.

The court will note that all of the cases, cited by the complainants on the point, arose where the company, whose organization was questioned, was a party, and had a chance to be heard, and was concluded by the decree. This is all we are now asking. The complainant has not produced and cannot produce a single case where the court has gone into the question of the organization of an interested company, without the joining of such company as a party.

JOHNSON, CHANCELLOR AD LITEM.— The bill in this cause was filed on the 2d day of April, A. D. 1891, by

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the complainant, the mayor and council of Wilmington, a municipal corporation of the State of Delaware, at the instance of Joseph L. Carpenter, Jr., J. Newlin Gawthrop, and Samuel Chambers, the board of directors of the street and sewer department for the City of Wilmington, against the defendants, John Edward Addicks, John G. Baker, Frederick P. Addicks, Simon B. Conde and Samuel Austin, to restrain them, their servants, agents and employees and all persons claiming to be servants, agents or employees of a certain alleged corporation called the Oxy-Hydrogen Company of the State of Delaware, from further opening or excavating or causing to be opened or excavated any of the streets of Wilmington for the purpose of laying gas pipes therein, without the permission first had and obtained of the said board of directors of the street and sewer department for the City of Wilmington, and on the same day a preliminary injunction was granted in accordance with the prayer of the bill. To this bill the defendants have demurred, and for cause of demurrer set forth that "it appears by said complainant's bill that the Oxy-Hydrogen Company of the State of Delaware, therein named, is a necessary party to the said bill, inasmuch as it is therein stated, in the fifth paragraph thereof, that the said Oxy-Hydrogen Company of the State of Delaware, by its counsel had notified the board of directors of the street and sewer department that it was its intention on the 31st day of March, 1891, to begin laying gas pipes in the streets of said city of Wilmington; that by section 6 thereof, it is fur-

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ther alleged that the present defendants claimed to be officers, servants and agents of said company in the opening and excavation of Liberty street, in said city, as therein set forth; that by paragraphs 7 and 8 of said bill, it appears that said company was incorporated by an act of the General Assembly of the State of Delaware, a copy of which act is to said bill attached, and that said defendants claimed to be acting thereunder; that by paragraph 8 of said bill, it appears that the organization of said company is called in question by said complainant; that by paragraph 9 and other paragraphs of said bill, it is alleged that even if said company is possessed of a legal organization, it would not have any right or authority under said act, without the permission of said board of directors of the street and sewer department, to enter upon, open or excavate any of the streets of said city for the purpose of laying gas pipes therein; that it further generally appears by said bill, that the whole scope and object of said bill is the determination of the rights and powers of said company under its said charter to lay gas pipes in the streets of said city, and that the result and effect of said suit will be to judicially determine the rights and powers of said company under its said charter; but the said complainant has not made the Oxy-Hydrogen Company of the State of Delaware a party to the said bill."

For the purpose of the proper consideration of the only question which is raised and presented by this demurrer, viz.: whether or not a certain alleged corpora-

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tion, called the Oxy-Hydrogen Company of the State of Delaware, should be made a party defendant, I will quote several paragraphs from the bill.

Paragraph 5 of the bill is in the following language: "That the said board of directors of the street and sewer department on the 30th day of March, A. D. 1891, was notified in writing by the counsel of certain persons designated as the Oxy-Hydrogen Company of the State of Delaware, that it was the intention of said alleged company on the day following, to-wit, on the 31st day of March, A. D. 1891, to begin the laying of gas pipes in the streets of said city; a full and true copy of which said notice is hereto annexed, marked B, and your orator prays that the same may be taken and considered as a part of this bill of complaint."

Paragraph 6 of the bill is in the following language, viz.:

"That afterwards, to-wit, in the day and year last aforesaid, pursuant to said notice, the said defendants, John Edward Addicks, John G. Baker, Frederick P. Addicks, Simon B. Conde and Samuel Austin, together with sundry other persons to your orator unknown, claiming to be officers, servants or agents of said alleged Oxy-Hydrogen Company of the State of Delaware, unlawfully and without the permission of the said board of directors of the street and sewer department, and without first making application to said board for such permission pursuant to the aforesaid rule or regulation of said board, entered upon, opened and excavated a certain street of said city, known as Liberty

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street, for the purpose of laying gas pipes therein, and still continue engaged in the opening and excavation of the said street for the purpose aforesaid, and threaten and intend to enter upon, open and excavate other streets of said city for the purpose of laying gas pipes therein.”

Paragraph 7 of the bill is in the following language, viz.:

“That said defendants claim and pretend that they were and are authorized and empowered to so enter upon, open and excavate any and all streets of said city for the purpose of laying gas pipes therein, under and by virtue of the charter of the said alleged Oxy-Hydrogen Company of the State of Delaware, without the consent or permission of said board of directors of the street and sewer department, and without making any application to said board as required by the aforesaid rules or regulations of said board.”

Paragraph 8 of the bill is in the following language, viz.:

“That an act of incorporation, entitled ‘An act to incorporate the Oxy-Hydrogen Company of the State of Delaware,’ was passed by the General Assembly of this State on the 3d day of April, A. D. 1873; a copy of which said act, marked C, is hereto annexed, which your orator prays may be taken and considered as a part of this bill of complaint; under which said act the said defendants claim to be acting as aforesaid; but your orator is informed, believes and charges that no legal or valid organization has ever been effected; and your

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orator denies that under or by virtue of said act of incorporation the said defendants or any of them have any right or authority to enter upon, open or excavate any of the streets of said city for the purpose of laying gas pipes therein."

Paragraph 9 of the bill is in the following language, viz.:

"That your orator is advised, believes and avers that the said alleged Oxy-Hydrogen Company of the State of Delaware has not, and even if possessing a legal organization would not have any right or authority under the said act of incorporation, without the permission of said board of directors of the street and sewer department, to enter upon, open or excavate any of the streets of said city for the purpose of laying gas pipes therein."

Paragraph 10 of the bill is in the following language, viz.:

"That before the expenditure by or on behalf of the said alleged Oxy-Hydrogen Company of the State of Delaware, of any money in or for the prosecution of the business for which said charter was granted, said board of directors of the street and sewer department became possessed of and vested with entire jurisdiction and control of the streets of said city as hereinbefore set forth; and the power granted by said charter to said company to lay gas pipes in the streets in this State was thereby subordinated to the paramount power and authority of said board to control the streets of said city and to prescribe and regulate the use thereof."

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Paragraph 13 of the bill is in the following language, viz.:

"That heretofore, to wit, on the 1st day of April, A. D. 1891, copies of the aforesaid preambles and resolutions of said board were delivered respectively to the counsel of the said alleged Oxy-Hydrogen Company of the State of Delaware, and to the said defendant John G. Baker, who claims to be the president thereof; yet the said defendants persist in their wrongful and illegal opening and excavating of the streets of said city as aforesaid."

It is a well-established and undoubted rule in equity proceedings that all persons materially interested should be parties to the suit, either as complainants or defendants, in order that the court may determine the rights of all parties interested in the subject-matter of the suit and make a complete decree. 1 Del. Ch. 167-174; 4 id. 249.

This rule, however, is subject to certain exceptions not necessary here to mention. It is contended on the part of the defendants, that this rule in regard to parties has been violated by the complainant by its omission to make a party defendant in this cause a certain alleged corporation called the Oxy-Hydrogen Company of the State of Delaware, which said company the defendants claim is a legally existing corporation under the laws of this State, possessing a legal and valid organization, and for the omission on the part of the complainant to make the said company a party defendant, have demurred to the bill.

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It is undoubtedly true that whenever a want of proper parties appears on the face of a bill, the proper mode to take advantage of this objection is by a demurrer. Mitf. Ch. Pl. & Pr. 206.

Does it appear on the face of the bill filed in this cause that the complainant has failed or omitted to make a party a defendant who ought to have been made such?

While it is true that the complainant in certain paragraphs of the bill, and which are fully set forth above, refers to a certain alleged corporation called the Oxy-Hydrogen Company of the State of Delaware, yet at the same time in no way recognizes in said paragraphs or in any other parts of the bill, the valid or legal existence of such a corporation as the Oxy-Hydrogen Company of the State of Delaware, but on the contrary, expressly charges that no legal or valid organization of said company has ever been effected. It nowhere appearing on the face of the bill that there is in existence a corporation possessing a valid or legal organization by the name of the Oxy-Hydrogen Company of the State of Delaware; but a corporation by that name, possessing a legal and valid organization, being expressly denied by the bill, I do not see how a demurrer for want of proper parties, would properly lie.

By demurring to the bill instead of adopting some other course of pleading, the defendants have necessarily admitted the truth of the matters and facts contained in the bill, and as it is alleged in the bill that no legal or valid organization of the said Oxy-Hydrogen Company of the State of Delaware has ever been effected, the effect of the demurrer is to admit the truth of such allegations.

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If it is the object and purpose of the defendants to controvert the allegations contained in the bill, they should do so by some other mode of pleading than by demurring.

As it is my opinion that this demurrer should be overruled, for the reasons above given, I have not thought it necessary to deal with many of the questions discussed at the argument, especially as most of them will more appropriately arise at some subsequent stage of the cause, when the cause shall be at issue upon the proper pleadings.

The demurrer must be overruled, and leave is granted to the defendants to plead or answer.

Syllabus.

WILLIAM ALLEN et al. v. JAMES LEACH, Administrator
d. b. n., c. t. a., of WILLIAM ALLEN, Deceased.

Orphans' Court, New Castle, March Term, 1894.

Statute of Limitations in favor of executors, administrators and guardians — the constitutional notice of the settlement must first be given before the statute begins to run. An executor, administrator, or guardian depositing money to his private credit, renders him personally liable for loss — likewise if deposited with a private banker; Neglect of duty, holding money past legal time, forfeits commissions.

1. Section 21, article 6 of the Constitution provides that the executor, administrator or guardian shall, within three months after settlement of his account, give notice in writing to all persons entitled to shares of the estate, or to their guardians, respectively, if residing within the State, that the account is lodged in the office of the register of wills for inspection. Until this notice is given, the Statute of Limitations cannot be pleaded to exceptions to the account, notwithstanding the statute which provides that "no exceptions to an account of an administrator, executor or guardian, settled by the register for the county, shall be received and filed in the Orphans' Court after the expiration of three years from the settlement of said account."
2. An administrator depositing money belonging to the estate in a bank, in his own name, becomes thereby personally liable to the estate for the same, though it was lost by the failure of the bank with which the deposit was made.

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3. An executor, administrator, or guardian should not place money belonging to the estate or ward with a private banking institution.
4. The holding by an executor or administrator of money belonging to the estate beyond the time for distribution is a failure of duty which forfeits his right to commissions.

EXCEPTIONS to the account of an administrator.

Judicial settlement of the account of James Leach, administrator *de bonis non*, with the will annexed, of the estate of William Allen, deceased, to which William Allen and others filed exceptions. The facts are fully set forth in the first portion of the opinion of the Chancellor.

R. G. Harman and J. H. Whiteman, for plaintiffs.

1. As to the question whether the commissions allowed to James Leach in his accounts should not be forfeited by reason of his neglect of duty as administrator of the estate.

If trustee acts honestly up to a certain period and receives a commission, and after that period acts dishonestly, whether or not his unfaithfulness will have a retrospective effect so as to take from him his commissions received during a period when he acted faithfully, is, both upon reason and authority, decided in the affirmative.

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This must be true, for the intention of an executor, administrator, trustee or guardian is wrapped up in his own bosom, and is not known until the passing of his account, and if the law were otherwise he could commit a breach of trust and receive the same benefit as a faithful and honest trustee, because his act would not be known until the passing of his account. He could, therefore, simply pass his account, and by so doing could secure his commissions, and afterwards by retaining the funds for a longer period than he could justly claim, appropriate them to his own use, and thereby commit a breach of trust (as was done in this case), all of which may have been his deliberate intention from the beginning. But the case of *Berryhill's Appeals*, 35 Penn. St. 245, expressly decided that he would be entitled to no commissions whatever. The facts in that case showed the trustee acted honestly for ten years and received yearly commissions during the whole of that period. But from that period, the end of the said ten years, said trustee mismanaged said estate. Upon final settlement of the trust, the above-stated facts appearing to the court (said court being the Court of Errors and Appeals), said court determined that the trustee was not entitled to commission for the period of his mismanagement of said estate, and that said commissions that had already been allowed him during the faithful part of his trust, were, upon said facts, ordered by the court to be taken from said trustee and paid back to the *cestui que trust*.

If an executor, administrator or trustee deposit trust moneys in a bank in his own private name, or mingle

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the trust moneys with his own moneys in his own private account, and the bank fails, the executor, administrator or trustee is personally liable, and must bear the loss. Schouler on Executors, § 329; 1 Lewin on Trusts, 295; Adams' Eq., § 60; Hill on Trustees, 376; 1 Perry on Trusts, § 463 (443); 2 Story's Eq. Jur., § 1270; Massey v. Banner, 4 Madd. 219; McDonnell v. Harding, 7 Simm. 178; Freeman v. Fairlie, 3 Meriv. 39; Massey v. Banner, 1 Jac. & Walk. 241; Wren v. Kirton, 11 Ves. 377; Darke v. Martin, 1 Beav. 525; Stafford's Case, 11 Barb. 353-355; Jenkins v. Walker, 8 Gill & Johns. 138-141, 142; Baskin v. Baskin, 4 Lans. 90-94; Case v. Abell, 1 Paige, 393-402; Stanley's Appeal, 8 Penn. St. 431-435; Shaw v. Buman, 34 Ohio St. 25-32; Cartmell v. Allord, 7 Bush, 482-485; Mason v. Whittenne, 2 Cald. 243, 244, 245; Sommers v. Reynolds, 95 N. C. 404, 414, 416, 417; McCallister v. Commonwealth, 30 Penn. St. 536-538; Williams v. Williams, 55 Wis. 300-309.

If an executor, administrator or trustee place trust moneys in a bank and let them remain for a longer time than was necessary for the carrying out of the purposes of the will or the administration of the trusts, especially if they are left to remain there when, according to the express terms of the will or trust, they should have been paid out and distributed among those entitled to the same, and the bank fails, the executor, administrator or trustee is personally liable, and must bear the loss. Schouler on Executors, 322; Am. & Eng. Ency. of Law, vol. 7, 352; 1 Lewin, 296-297; Hill on Trustees, 527-528,

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536; 1 Perry on Trusts, 436, 443, 444; Wood v. Myrick, 17 Minn. 408; Dortch v. Myrick, 71 N. C. 224; Moyle v. Moyle, 2 Rus. & Mylne, 710.

If an executor, administrator or trustee deposit trust funds in his own private name or mingle the trust funds with his own moneys in his own private account, or permit the trust money to remain in bank for a longer time than was necessary to the carrying out of the purposes of the will, or the due administration of the trust, and especially if they are permitted to remain there when, according to the express terms of the will or trust, they should have been paid out or distributed among those entitled to the same, the executor, administrator or trustee is chargeable with interest upon said trust moneys. Schouler on Executors, 538; 1 Lewin, 338; 1 Perry on Trusts, 463-468; English Cases: 1 Brown Ch. 384; 15 Beav. 389-397; American Cases; Lind v. Lind, 41 N. H. 359; Mickle v. Cross, 10 Md. 362; Wistar's Appeal, 54 Penn. St. 60, 66; Duffy v. Duncan, 35 N. Y. 191; Estate of John B. Clark, 55 Cal. 355-357; Miller v. Bumly, 4 Henn. & Munf. 415, 417, 418; Estate of McQueen, 44 Cal. 590; Handy v. Snodgrass, 9 Leigh, 409; Utica Ins. Co. v. Lynch, 11 Paige, 520, 521, 522; Gwynn v. Dorsy, 4 Gill & Johns. 313-319; Norris' Appeal, 71 Penn. St. 106-123; Monteith, Ex. v. Ballery, 21 Md. 427-432; Smith's Admr. v. Hooper, 23 id. 285; Stanley's Appeal, 2 Wright, 525-530; Munford v. Murray, 6 Johns. 1-17; Garniss v. Gardiner, 1 Edw. Ch. 128-130.

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At common law the office of trustee was purely honorary and commissions were not allowed. Robinett's Appeal, 12 Cas. 174; Berryhill's Admr. Appeal, 35 Penn. St. 249; Clauseis Estate, 84 id. 51 (1877); Stehman's Appeal, 5 id. 417; Swartsoalu Appeal, 4 Watts, 77-79.

2. As to the plea of the Statute of Limitations in this cause, the provisions of section 21 of article 6 of the Delaware Constitution plainly brings this administrator without its bar. No notice of the settlement of his account has ever been given to the parties entitled to shares in the estate, as the mandatory language of the Constitution requires. His neglect to perform that duty will certainly not hasten the operation of the statute for his own benefit, and to save him harmless from his further wrong.

The following cases will fully support the position we take upon this point:

Statute of New York requires executor and administrator to publish notice of grant of letters testamentary, or of administration, and for creditors to present their claims against estates, etc., and if claims are rejected or disputed, to bring action within six months after such rejection, or be forever barred.

Held, to enable executor or administrator to take advantage of such statute — six months — he must prove that he gave the written notice. If he does not prove this, the Statute of Limitations (six months) is no bar.

To subject a creditor to the short Statute of Limitations — of six months — relating to the duties of ex-

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ecutors and administrators, it is incumbent on the latter to show the publication of notice to creditors to come in, etc. *Clark v. Sexton's Admrs.*, 23 Wend. 477.

An executor or administrator cannot avail himself of the six months' Statute of Limitations above cited, unless he has strictly complied with the statute requiring him to obtain an order of the surrogate for the publication of a notice to creditors of the deceased to present their claims, and has published the proper notice. *Hardy v. Ames*, 47 Barb. 413; 1 Denio, 159.

The above cases embody the principle that governs our own — namely, if a statute makes it the duty of the executor or administrator to do a certain act, give notice, etc., and that when he does that act, the Statute of Limitations shall then (after a certain time) be a good bar to an action, the doing of that act (giving notice) is a condition precedent to the running of the Statute of Limitations; and if the executor or administrator, through neglect or otherwise, fail to do as the statute commands him to do, he shall not be permitted to plead the Statute of Limitations as a shield, for that would be to violate his duty and then take advantage of his own wrong at the expense of, and loss to, innocent persons.

Statute of Missouri requires executor or administrator to give notice to creditors of the grant of letters testamentary or of administration, within thirty days after such grant, and if he does so and creditors do not present their demands three years thereafter, they shall be forever barred, held, that executors or administrators can

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only insist on the Statute of Limitations — three years — upon the condition precedent of their having given the statutory notice of the grant of letters. If they did not give such notice, the Statute of Limitations — three years — is no bar.

If publication of notice to creditors required by the twentieth section of second article of the act concerning the administration of estates be not commenced within thirty (30) days after grant of letters, debts against the estate are not barred after the lapse of three years. *Hawkins & Bleckwell v. Ridenhour*, 13 Mo. 125.

An administrator cannot avail himself of the lapse of three years as a bar to a demand against the estate of his intestate unless he has given notice of his letters in the manner and within the time prescribed by law. *Bryan v. Mundy's Admr.*, 17 Mo. 556, 557; *Clark v. Collins*, 31 id. 260; 54 id. 102.

Statute of Mississippi requires executor or administrator on final settlement of accounts to give forty days' notice to those interested in the estate, that said final settlement of accounts is on record, and if it be not correct, to except to it. Held, that executor or administrator cannot plead Statute of Limitations as a bar unless he has performed his duties by giving statutory notice. If he does not give the statutory notice, such final accounts are treated, 1st, merely as annual accounts; 2d, those interested may come in and except to them after any lapse of time.

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As to heirs and legatees not notified, an executor's final settlement has only the effect of an annual account. *Crawford v. Redus et al.*, 54 Miss. 700; *Heitkamp v. Biedenstein*, 3 Mo. App. 450; *Treadwell v. Herndon*, 41 Miss. 38; *Winborn v. King et al.*, 35 Miss. 157; *Neal's Admr. v. Williams' Admr.*, 12 id. 649.

The New York and Missouri cases embody the same principle that is involved in our own, namely, that when a statute requires an executor or administrator to give notice to parties interested, and that if they give such notice, then the Statute of Limitations (within a certain time after) shall be a bar upon the conditions precedent that such notice be given, and if such notice be not given, the Statute of Limitations cannot be pleaded, and it shall never be a bar.

But the Mississippi cases involve the very identical principles, the difference being that in the Mississippi cases, the notice required to be given is a mere statutory notice; in ours, the notice is demanded by the Constitution itself.

And as the Mississippi cases decided that a final settlement without the statutory notice was merely,

1. An annual settlement; and, 2. That suit could be brought at any time afterwards, surely not only the same doctrine should apply with us, but with a much greater force, since the Mississippi notice is a notice that can be repealed by any Legislature, whereas the Delaware notice is a notice that cannot be touched except by the people themselves, sitting as a constitutional convention.

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Anthony Higgins, for defendant.

The Statute of Limitations, as pleaded in this case, operates as a bar to the exceptions. Revised Code, chap. 124, §§ 7, 8.

This is true, notwithstanding the provision of the Constitution of Delaware, article 6, section 21, which is as follows: "An executor, administrator, or guardian, shall file every account with the register for the county, who shall, as soon as conveniently may be, carefully examine the particulars with the proofs thereof, in the presence of such executor, administrator or guardian, and shall adjust and settle the same, according to the very right of the matter, and the law of the land; which account so settled shall remain in his office for inspection; and the executor, administrator, or guardian, shall, within three months after such settlement, give notice in writing to all persons entitled to shares of the estate, or to their guardians, respectively, if residing within the State, that the account is lodged in the said office for inspection.

"Exceptions may be made by persons concerned, to both sides of every such account, either denying the justice of the allowances made to the accountant, or alleging further charges against him; and the exceptions shall be heard in the Orphans' Court for the county; and thereupon the account shall be adjusted and settled according to the right of the matter and law of the land."

Section 7 of the Act of Limitations bars the exceptions, notwithstanding the provision of section 21 of

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the Constitution, which provides that the executor, administrator, or guardian, shall, within three months after such settlement, give notice in writing to all persons entitled to shares of the estate, or to their guardians, respectively, if residing within the State, that the account is lodged in said office for inspection.

The provision of section 7, chapter 124, is that no exception to the account of an administrator settled by the register shall be received or filed in the Orphans' Court after three years from the settlement of said account.

The Constitution provides that the notice in writing required of the executor, administrator, or guardian, shall be within three months after such settlement. The Act of Limitation, therefore, begins to run with the settling of the account by the register, while the notice need not be given until three months thereafter. The Constitution does not say that the failure to give such notice shall upset or abrogate such settlement.

This construction of the statute and the article of the Constitution accords with the general principle of law that the Statute of Limitations begins to run whenever the creditor or plaintiff could bring his action, and not when he knew he could. 3 Parsons on Contracts, 92; *Waters v. The Earl of Thanet*, 2 Q. B. (N. S.) 757.

In cases of executors and administrators, the limitations imposed by statutes are more stringently enforced than those of the general Statutes of Limitation both at law and in equity. Wood on Limitations, 111 (note 1), and cases cited.

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The right to file exceptions to an account is complete in the exceptant as against the executor or administrator from the time the account, after having been filed, has been adjusted and settled by the register. The right to except as a cause of action completely accrues upon such adjustment and settlement. The right to except is complete before any written notice is given by the executor or administrator, and even if he never gives such notice. The provision of the Constitution creating the right to except does not prescribe that it shall arise only after written notice of it shall have been given by the executor or administrator. It cannot be claimed that the exception made to an account is bad because no notice has been given. If such were the construction of the Constitution, the present exceptions themselves would fall, no notice having been given by the administrator in this case.

The Statute of Limitations begins to run from the time when the right of action accrues. The only exception to this rule is that at the time when the right of action accrues, there must be in existence a party to sue and be sued, or the statute does not attach thereto. Wood on Limitation of Actions, 254, § 117.

As in the case of a decedent, the statute does not begin to run until the administrator or executor has been appointed and qualified. This rule is applied in the case where a demand is necessary to fix the liability of the party; in such case, until demand made, and the right of action thereby shall have accrued, the Statute of Limitations does not begin to run. *Wolf v. Whiteman*, 4 Harr. 246.

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Even as against the provision of the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts, Statutes of Limitation are invariably upheld because they only affect the remedy. Wood on Limitation of Actions, 24, § 11.

The right to take exception to the account of an administrator with the will annexed by way of appeal to the Orphans' Court accrued to the parties concerned immediately upon their settlement by the register.

The Constitution, while providing that exceptions may be made by persons concerned, nowhere says that the right to make such exceptions is postponed until notice shall have been given to them in writing by the executor or administrator.

The Constitution nowhere says that the right to except from the settlement of the account is suspended by any delay or failure on the part of the executor or administrator to give such notice.

The Act of Limitation, therefore, and the bar of the statute begins to run from the time of such settlement, and there is no word or letter of the Constitution which says that the running of the bar of the statute is suspended or delayed by the failure or neglect of the executor or administrator to give such notice.

These principles have been fully established by the Superior Court on appeal from the Orphans' Court in the case of *State v. Wilson's Admr.*, 3 Harr. 348; *State v. Layton et al.*, 4 id. 512; *Layton v. State*, id. 8, 34.

The court will not consider the constitutional question raised in this case as to the operation or nonopera-

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tion of a statute passed by the General Assembly, unless such a question is absolutely necessary to the determination of the cause.

The *laches* of the exceptants, the long delay in taking action, and the acquiescence for so many years by the exceptants without demand upon the administrator, create an equitable estoppel which precludes and bars the exceptants from obtaining any relief in this court.

The court will not, as a general rule, pass upon a constitutional question and decide a statute to be invalid unless a decision upon that very point becomes necessary to the determination of the cause. While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable. Cooley on Constitutional Limitations, 196.

A court, in declaring a law unconstitutional, must necessarily cover the same ground which has already been covered by the legislative department in deciding

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upon the propriety of enacting a law, and they must indirectly overrule the decision of that co-ordinate department. The task is, therefore, a delicate one, and only to be entered upon with reluctance and hesitation. Cooley on Constitutional Limitations, 193; *ex parte* Randolph, 2 Brock, 447; *Frees v. Ford*, 6 N. Y. 176, 178; *Cumberland, etc., R. R. Co. v. County Court*, 10 Bush, 564; *White v. Scott*, 4 Barb. 56; *Mobile & Ohio R. R. Co. v. State*, 29 Ala. 573.

The *laches* of the exceptants operate as a bar to the action. The events sought to be inquired into in this case occurred nearly twenty years ago, and, while the last account filed by the administrator was in 1886, from 1873 up unto that time, when the exceptants had full opportunity of bringing any action to charge this administrator for any sums due them, no demand was ever made on him for a settlement, and the question as to whether or not this administrator can now be charged with funds lost by him on account of the failure of a certain bank nearly twenty years ago, enters into a discussion of these facts at this late day, when the memory of the defendant is dimmed by the lapse of time, and part of the official records of a court are missing or have been destroyed.

The bar upon which the doctrine of laches is based is *vigilantibus non dormientibus, sebvniunt leges*. Stale demands will not be aided where the party has slept upon his rights and acquiesced for a great length of time. The doctrine is based upon grounds of public policy, and its aim is the discouragement, for the peace

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and repose of society, of stale and neglected demands. *Piatt v. Vattier*, 9 Pet. 405; *Macnight v. Taylor*, 1 How. 161; *Bowman v. Wathen*, id. 189; *Wagner v. Baird*, 7 id. 234; *Story's Eq. Jur.*, § 1520; *Badger v. Badger*, 2 Wall. 87; *Hume v. Beale*, 7 id. 336; *Marsh v. Whitmore*, 21 id. 178; *Sullivan v. Portland & K. R. Co.*, 34 U. S. 806; *Godden v. Kimmell*, 99 id. 201; *Brown v. County of Buena Vista*, 95 id. 157; *Speidel v. Henrici*, 120 id. 377; *Johnson v. Johnson*, 5 Ala. 90; *Castner v. Walrod*, 83 Ill. 171; *Chew v. Farmers' Bank of Md.*, 2 Md. Ch. Dec. 231; *Sedlack v. Sedlack*, 14 Or. 540; *Hayes' Appeal*, 113 Penn. St. 380; *Doggett v. Helm*, 17 Gratt. (Va.) 96; *Coleman v. Lyne*, 4 Rand. (Va.) 494; *Frader v. Jarvis*, 23 W. Va. 100; *Smith v. Clay*, 3 Bro. Ch. 640; *Hovenden v. Lord Annesley*, 2 Sch. & Lef.; *Herey v. Dinwoody*, 4 Bro. Ch. 257; *Beckford et al. v. Wade*, 17 Ves. 87.

In many cases, a similar doctrine to the doctrine laid down in the above cases has been enunciated, although stated in different language. *Perkins v. Cartmell*, 4 Harr. 270; *Smith v. Coker*, 14 Ga. 390; *Aikens v. Hill*, 7 id. 573; *Bickerman v. Burgess*, 20 Ill. 266; *Hughes v. Jones*, 2 Md. Ch. Dec. 178; *Smith v. Washington*, 11 Mo. App. 519; *Pickering v. Pickering*, 38 N. H. 400; *Smith v. Duncan*, 16 N. J. Eq. 240; *Sharp v. King*, 3 Ired. Ch. (N. C.) 402; *Sleamers' Appeal*, 58 Penn. St. 168; *Classcock v. Nelton*, 26 Tex. 150; *Harcourt v. White*, 28 Beav. 303; *Stratford v. Lord Alborough*, Beat. 228, 236; *Cairncross v. Larimer*, 13 Macq. H. L. Cas. 827; *Mayor of Colchester v. Lowten*, 1 Ves. &

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B. 226, 246; LeGuen v. Gouverneur, 1 Johns. Cas. 436, 502; Galena & S. W. R. Co. v. Ennor, 116 Ill. 55.

In order to constitute *laches*, it is only necessary to show that the exceptants in this case have failed or omitted to obtain knowledge of the facts when the same was obtainable. *Laches* will also be imputed where the circumstances are such which should have induced inquiry and the effort to obtain knowledge. Larzelere v. Starkweather, 38 Mich. 96; Learned v. Foster, 117 Mass. 365; Union Dime Savings Inst. v. Clark, 59 How. Pr. (N. Y.) 342; Sedlak v. Sedlak, 14 Or. 540; Bowman v. Wathen, 1 How. 189; Veazie v. Williams, 3 Story, 611.

In the application of the rule relative to the *laches*, a distinction has been made between what have been termed executed and executory interests. An executed interest is such an interest as is complete and does not require the assistance of a court of equity to create in the person of the claimant a legal right to it, but where a person is obliged to apply for the peculiar relief afforded by a court of equity to obtain a right of which he is not in possession, his interest is described as executory. In cases of executory interest, the plaintiff must come into court promptly and without unreasonable delay. 12 Am. & Eng. Encyc. of Law, 566; Hart v. Clark, 6 H. L. Cas. 633; Garden Gully U. Q. M. Co. v. McLister, L. R. 1 App. Cas. 39.

Independently of the application of the Statute of Limitations to suits in equity, by analogy or otherwise, courts of equity have usually held that delay for a period sufficient to deprive the complainant of the right to

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enforce his demand in a court of law is such *laches* as will justify the dismissal of a bill in equity. *Preston v. Preston*, 95 U. S. 200; *Dade v. Irwin*, 2 How. (U. S.) 383; *Sedam v. Williams*, 4 McLean, 51; *Blanchard v. Williamson*, 70 Ill. 647; *Packwood v. Gridley*, 39 id. 388; *Ramsey v. Perley*, 34 id. 504; *Bashor v. Cady*, 2 Carter (Ind.), 582; *Finney v. Harris*, 30 Miss. 36; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Lyon v. Lyon*, 8 Ired. Eq. (N. C.) 201; *Neely's Appeal*, 85 Penn. St. 387; *Bank of Gettysburg v. Thompson*, 3 Grant (Penn.), 114.

Where an account settled by an executor has been allowed to remain unchallenged for a number of years, the court will not open it except upon clear evidence of fraud.

The defense of *laches* may be pleaded not only when the accounts are attacked in the Court of Chancery, but also when they are attacked in the Orphans' Court. *Skinner v. Skinner*, 1 J. J. Marsh. (Ky.) 594; *Richardson v. Billingslea* (Md.), 16 Atl. Rep. 65; *Ridenow v. Keller*, 2 Gill. (Md.) 134; *Lenox v. Harrison*, 88 Mo. 491; *Bradley v. Bradley's Admr.*, 83 Va. 75; *Lupton v. Janney*, 13 Pet. 381; *Gould v. Gould*, 3 Story, 516; *Oneill v. Hamill*, Beat. 618; *Yearly v. Cockey*, 68 Md. 174.

WOLCOTT, CHANCELLOR.—William Allen, late of New Castle County, died in May, 1859, leaving a will, which was duly admitted to probate in said county on the 1st day of June of the same year, whereby he directed his property to remain as it was until his youngest child

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should arrive at the age of twenty-one years, and then be sold and the proceeds of the sale thereof equally divided among his children or their heirs. The Spring Grove farm, however, which he had entered into an agreement to sell, he directed, in case of a failure of the purchaser or bargainee to comply with the terms of sale, to be disposed of at the best advantage and the money secured by a loan on good security. The clear rents and profits arising from the real estate in Wilmington he directed to be applied to the support and education of his minor children and to the payment of the annuity of \$200 to his widow during her life or widowhood. James Allen, who was the youngest child of the testator, arrived at his majority the 17th day of August, A. D. 1871. In 1870, James Leach was appointed administrator d. b. n. c. t. a. of the deceased. On the 10th day of October, A. D. 1873, he passed a first account in which he charged himself with seven hundred and eleven dollars and fifteen cents (\$711.15), and was allowed credit to the amount of one hundred and twenty dollars (\$120), leaving a balance in his hand of five hundred and ninety-one dollars and fifty-six cents (\$591.56). The principal item on the debit side of the account was six hundred and ninety-three dollars and fifty-seven cents (\$693.57), which was admitted to have been derived from the sale or disposition of the Spring Grove farm and the principal item on the credit side of the account was seventy-one dollars and fifteen cents (\$71.15) for commissions. On the 2d day of January, A. D. 1886, he passed another account in which he charged himself with three hundred and sixty-four dol-

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lars and ninety-seven cents (\$364.97) only, consisting entirely of rents received subsequent to the passage of the first account, and was allowed credit to the amount of three hundred and thirteen dollars and forty-six cents (\$313.46), leaving a balance in his hands of fifty-one dollars and fifty-one cents (\$51.51). One item of the credits was thirty-six dollars and forty-nine cents (\$36.49) for commissions. The exceptions were to the commissions allowed in both accounts, namely: Seventy-one dollars and fifteen cents (\$71.15) and thirty-six dollars and forty-nine cents (\$36.49), respectively, on the ground of fraud and mismanagement of the estate; also, to the items of fifteen dollars (\$15) and ten dollars and eighty-six cents (\$10.86), in what is called the first and final account, because the administrator obtained a credit therefor in the first account; also, to the neglect or omission of the administrator to charge himself in his second account with the unappropriated balance shown by the first account, and also to the name or title of the second account because it was misleading.

The defendant pleaded: First. The Statute of Limitations. Second. The general issue. Third. That the said balance of five hundred and ninety-one dollars and fifty-six cents (\$591.56) shown by the first account of the administrator, with which he did not charge himself in the second account, was a part of a larger sum of money which the said defendant deposited with John McLear & Son, reputable bankers of the City of Wilmington in New Castle County, and the said John McLear & Son thereafter failed and were declared bankrupts in the United States court, and that the said

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defendant received only two dividends, amounting to the sum of one hundred and thirty-one dollars and ninety-six cents (\$131.96), with which said sum the defendant acknowledges that he is justly chargeable, together with the sum of sixty-three dollars and sixty-seven cents (\$63.67), being the difference between the said balance of five hundred and ninety-one dollars and fifty-six cents (\$591.56) and the sum of five hundred and twenty-seven dollars and eighty-nine cents (\$527.89), which said last-mentioned sum was the amount of the said James Leach's balance in his account with the said John McLear & Son at the time of their failure. The exceptants replied substantially as follows: To the first plea, that the Statute of Limitations had not run against either of said accounts because the said James Leach did not give any notice, either verbal or written, to the said exceptants within three months, or any notice at any time after either of the same had been lodged in the proper office for inspection. To the second plea the *similiter*. To the last plea that the said John McLear & Son, with whom the said sum of five hundred and twenty-seven dollars and eighty-nine cents (\$527.89) was deposited, were private bankers, and that it was deposited in his own private name as "James Leach." That by the terms of the will of the said testator his property was to remain as it then was until his youngest child arrived at the age of twenty-one years. That his youngest child was James Allen, who arrived at said age the 17th day of August, A. D. 1871, at which time the said James Leach should have paid and distributed the said sum of five hundred and

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ninety-one dollars and fifty-six cents (\$591.56) among the children of the said William Allen, the testator. But instead thereof the said James Leach, though he had said sum of five hundred and ninety-one dollars and fifty-six cents (\$591.56) in his hands on the 9th day of February, A. D. 1871, yet he wrongfully permitted the sum of five hundred and twenty-seven dollars and eighty-nine cents (\$527.89) to remain on deposit with the said private banking firm of John McLear & Son until after said firm had been declared bankrupt, to-wit, on the 10th day of November, A. D. 1873. That the said James Leach, on the failure of the said firm of John McLear & Son, appeared, claimed and proved said sum of five hundred and twenty-seven dollars and fifty-six cents (\$527.56) as his own private money in his own private name. That the dividends declared by William Canby, the assignee in bankruptcy of the said banking firm, amounting to one hundred and thirty-one dollars and ninety-six cents (\$131.96), were paid to and received by the said James Leach as his own private funds; and that the loaning of the said sum of five hundred and twenty-seven dollars and eighty-nine cents (\$527.89) to the said private bankers and the placing of the same upon deposit with them was a clear violation of his duty as administrator and in opposition to the express terms of the will of the said William Allen, deceased, and was of itself a gross breach of trust, said will having directed that the proceeds arising from the sale of the said Spring Grove farm should be invested "in a loan on good security."

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Demurrer and joinder in demurrer.

There is no dispute that the period for the distribution of the unappropriated balance shown by the first account had arrived when it was rendered and settled, and so of the balance shown by the second account. The important question raised by the demurrer is whether the Statute of Limitations is a complete bar to the exceptions filed to the accounts of the administrator, James Leach. To answer this question it is necessary to ascertain when the statutory period of limitations began, if it ever did begin. Section 6 of chapter 124 of the Revised Code provides that: "No exceptions to an account of an administrator, executor or guardian settled by the register for the county shall be received and filed in the Orphans' Court after the expiration of three years from the settlement of said account." The statute is absolute and imperative. Looking at it alone there are to be found no conditions to limit or suspend its operation except disability of infancy, coverture, or incompetency of mind. No notice, either before or after the time the account is rendered and settled, is required to be given to the parties in interest as a condition precedent to the running of the statute. The settlement is, therefore, entirely *ex parte* and the whole of the time within which competent and interested persons may assert their right to except to the account might expire, before they had received knowledge that it had been filed in the office of the register for the proper county.

While the fact that an executor, administrator or guardian is required by the law to render his accounts at stated times, of which all persons are supposed to

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have knowledge, may appear to soften this harsh feature of the statute, yet it does not, inasmuch as he may pass accounts at longer or shorter intervals as he may deem proper with the concurrence of the register, thus excluding this element of theoretical or constructive certainty of knowledge as to the date of the settlement of such an account.

Standing upon the bare statute there would be an end of all controversy. It stealthily creeps between parties and their rights and there is no power in the court supplied by the statute itself to arrest its motion. But section 21 of article 6 of the Constitution of the State provides that: "An executor, administrator or guardian shall file every account with the register for the county who shall, as soon as conveniently may be, carefully examine the particulars with the proofs thereof in the presence of said executor, administrator or guardian, and shall adjust and settle the same according to the very right of the matter and the law of the land, which account so settled shall remain in his office for inspection and the executor, administrator or guardian shall, within three months after such settlement, give notice in writing to all persons entitled to shares of the estate or to their guardians, respectively, if residing within the State, that the account is lodged in the said office for inspection."

The notice required by this provision of the Constitution, it is admitted, the administrator never gave; and, so far as anything appears to the court, the exceptants remained in ignorance of the doings of the adminis-

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trator until about the time of the filing of the exceptions to the accounts. But to avoid the effect of such neglect of duty, the defendant's solicitor contended with much zeal that to allow the statute to be controlled by the Constitution, so far as to fix the date of such notice instead of the date of settlement as the time at which the period of limitation would begin, would amount to a judicial abrogation of the legislative will.

This is a very extraordinary proposition. It involves the assumption that the Legislature may abridge or annul a particular rule of conduct prescribed by the Constitution. That is what it amounts to. But the reverse of this is true. The Constitution, whenever it speaks, is the supreme law, and does modify the statute in all cases where the latter interferes with or impairs the right secured by the former. At the point of conflict between the two the statute must yield. It is not necessary to indulge in any speculation or conjecture as to whether or not the Legislature intended the settlement of an administration or guardian account to be the beginning of the period of limitation, because it makes no difference whether it did or not.

The plaintiffs, relying upon the provision of the Constitution in question, claim that their right to take this proceeding is not barred because no notice as therein required was ever given, and the defendant, relying upon the statute, claims that it is barred because more than three years have elapsed since the settlement of either account and before the filing of their exceptions. The Constitution and the statute together, therefore, constitute the law that governs this case as much as if

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they were both embodied in a single enactment; they are *in pari materia* and must be construed together. The Legislature could not dispense with the necessity of such notice in order to give effect to the literal terms of the statute; neither can the court. The Constitution imposes a duty; the statute confers a privilege upon the same person acting in a fiduciary or representative capacity. Now, if an executor, administrator, or guardian, who is in a certain sense a trustee, may interpose the Statute of Limitations against a proceeding of this kind with the confession upon his lips that he has disregarded the duty enjoined by the Constitution, then the manifest purpose thereof would be defeated.

The object of the notice is that the parties interested in his accounts may have an opportunity to investigate the same before their rights are extinguished by the lapse of time or rendered valueless by insolvency or other circumstances. If this is not its object, we might explore the breast of the framers of the Constitution in vain to find one.

Seeing, then, what an important part this duty plays in effecting the ends of justice between parties situated like these, the question naturally arises as to the best and most effectual way of enforcing its observance. The only practical mode that suggests itself to the mind is to deny the enjoyment of the privilege associated with the duty until its performance is clearly shown. I am, therefore, of the opinion that the defendant is not protected against this proceeding by the shield of the statute.

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Another good reason might be assigned for requiring the performance of the duty before the privilege or protection granted by the statute should be available, and that is that the matters inquired about partake very much of the nature of the subjects within the limits of equity jurisdiction. The Orphans' Court, sitting as a court of review of proceedings in the register's office involving matters of a trust character, to a certain extent, exercises the functions of an equity court. Now, one of the requisites to a correct status in a court of equity is the clean-handedness of the party invoking its aid. In such a court an old maxim is that "He who asks equity must do equity." The hands of the administrator are anything but clean. He seeks the protection of the statute when it is admitted that he has violated the plain duty imposed by the Constitution. He cannot, therefore, be helped by this court.

The fact that the administrator lost the greater part of the fund in his hands by reason of the failure of McLear & Son does not constitute a valid and meritorious defense *pro tanto* to this proceeding. He had no right to deposit the money belonging to the estate with private bankers to his individual credit, nor in fact with any banking institution in that way. When he placed the money to his own credit he elected to take the responsibility for its safe-keeping; besides, there was no time after the settlement of the first account when the money was not payable to the parties entitled, as the youngest child of the testator had reached his majority, the period fixed by him for the distribution of the same

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under the terms of the will. Again, if there had been a sufficient reason for not distributing the estate as directed by the will, he should have secured it by loan on good security as therein provided. The administrator having disregarded his duty in this respect, he cannot set up the loss of the money as before mentioned to the claim made by the exceptants. Then, as to commissions, they should be forfeited for the same reason. The second account should, therefore, be surcharged with the unappropriated balance shown by the first account plus the commissions allowed in said first account, with interest from the date of its settlement. The commissions allowed in the second account must also be disallowed and the items duplicated from the first account eliminated. Let the order or decree be drawn in conformity with this opinion.

Syllabus.

WILLIAM C. SPRUANCE, Administrator c. t. a. of KING DOLBOW, Deceased, v. THOMAS DARLINGTON, Executor of MARGARET DOLBOW, Deceased, et al.

New Castle, September Term, 1894.

Equitable jurisdiction — wills — construction — after-discovered will — executors under each — respective rights — statutory provision — dower — election by court after widow's death — Statute of Limitations.

1. A court of equity has jurisdiction of all matters in dispute between any and all parties to an action, the adjudication of which may affect the integrity of a trust fund in which all are interested, though the controversy as between some of them may be of a legal nature.
2. The jurisdiction of courts of equity is not entirely determined by the absence or presence of adequate legal remedy, though either is not an unimportant element in aiding the solution of such a question.
3. Under a will directing the executor merely to sell testator's real property, and divide the proceeds in a certain manner, the title thereto in fee descends to the heirs-at-law, subject to the power to sell, and they alone are entitled to the rents and profits thereof from the death of the testator up to the time of the exercise of the power to sell.
4. A bequest to a minor legatee can legally be paid only to his properly accredited guardian, and not to his parent.
5. Revised Code, chapter 89, section 12, which declares that all "lawful" acts of an executor who has been removed shall be deemed valid, does not embrace a claim to be credited with the erection of a monument over the

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grave of the deceased, the expense of which is unauthorized by law.

6. Where testator's will was not discovered until after the death of his widow, she having then had no opportunity to elect to take in dower or as a legatee thereunder, the court will make that election for her which will be most advantageous to her estate.
7. As against an executor's cause of action for assets of the estate against one who acted as executor under a will which was afterwards found to have been revoked, the Statute of Limitations does not begin to run until letters of administration have been granted to the executor properly appointed.
8. The Statute of Limitations does not begin to run against the right of legatees under testator's true will, discovered after his estate had been administered under a supposed will, until the granting of letters of administration under the former; they supposing their rights settled under the revoked instrument, and so accepting them.
9. A paper writing purporting to be the last will and testament of K. D. was duly admitted to probate, and letters of administration granted to M. D., his widow, as executrix. M. D. had the personal property of the deceased appraised, paid various legacies bequeathed in the paper writing to certain minors, to the parents of said minors, took various parcels of the real estate as one of the devisees, and collected rents of same, paid taxes and repairs. M. D. afterwards died, having devised certain of the property obtained from the estate of K. D. Subsequently a later will of K. D. was discovered and allowed by the register. Held,
 - a. That the estate of M. D. could not receive credit for the legacies paid to the parents of the minors; otherwise if M. D. had paid them to their accredited guardians.

Syllabus — Statement — Argument for complainant.

- b. That the estate of M. D. was liable for the amount of the appraisement of the personal property of K. D.
- c. That the estate of M. D. could not be credited with the rents collected and money expended for repairs.
- d. That the estate of M. D. could, however, be properly credited with the sums laid out in the payment of the debts of K. D.; otherwise for the expense of a tombstone over the grave of K. D., that not being a legal charge.

BILL IN EQUITY.—Bill by William C. Spruance, as administrator with the will annexed of King Dolbow, deceased, against Thomas Darlington, executor of Margaret Dolbow, deceased, and others. Defendant's decedent had qualified as executrix under a supposed will of said King Dolbow, her deceased husband, and had administered his estate in accordance with its terms. After her decease another instrument was discovered, which proved to be his true will, and plaintiff was appointed administrator thereunder. He now brings this bill to determine the rights of all the defendants under the will of his decedent, and to recover from the defendant Darlington, as executor, any amount to which the plaintiff's estate may be entitled. The facts are more fully set forth in the opinion of the Chancellor.

W. C. Spruance, complainant in *propria persona*, and C. M. Curtis, for William H. Dolbow and Hattie Moy, two of the defendants.

The jurisdiction of the Court of Chancery in this State to enforce an accounting between persons maintaining a fiduciary relation with each other is well

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settled. The duties as to administration of estates of decedents constitute an active express trust, and with respect to legatees, distributees and creditors, the executor or administrator bears the relation of a trustee to the *cestui que trust*. Obtaining an account from an executor or administrator by a bill in equity is an invocation of the exclusive jurisdiction of the court, and as a result, it is not a matter of any consideration that there would also be a remedy at law.

In *Davis v. Davis*, 1 Del. Ch. 256, a bill for an account of rents and profits was allowed against a guardian by the administrator of the deceased ward, who had attained her majority before her decease. "This is a matter of account and is peculiarly proper for investigation in the court." * * * "I will not say that the complainant could not sue at law for these rents and profits, but his remedy there could not be as certain nor as effectual as in this court."

When the subject-matter is an equitable interest, jurisdiction to obtain an account is a necessary consequence, without regard to legal remedy; and a suit for accounting is proper where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account. 3 Pom. Eq. Jur. 1420, 1421.

This court has jurisdiction not only as to the accounting between the representative of the after-discovered will and the executor of the first will, but having taken partial jurisdiction, it will dispose of the whole matter in controversy and settle the many conflicting rights by retaining jurisdiction to compel an accounting between

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John K. Dolbow and Mary Ann Hoffman to the representative of the second will, and by a decree of restitution to the estate of King Dolbow of all money received by them, which should have been paid to King Dolbow's executor, make a final determination of all matters at issue.

When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all matters at issue. So, also, the concurrent jurisdiction of equity may be exercised over matters and causes of action which are legal, and by the granting of legal remedies in order to avoid a multiplicity of suits. 1 Pom. Eq. Jur. 181.

In the case at bar, there is no fiduciary relation between the executor of the second will of King Dolbow and John K. Dolbow and Mary Ann Hoffman, such as would give him a right to require an account of rents, and as to them his remedy would primarily be an action at law. But inasmuch as such a fiduciary relation exists between the complainant and Darlington with respect to the same subject-matter, if this court take jurisdiction of the latter, it should of the former, and determine the whole matter at issue, thereby avoiding multiplicity of suits.

It cannot be claimed that Margaret Dolbow was entitled to both her common-law dower rights and the income of the fund devised in trust for her for life, because the latter provision was expressly declared to be in lieu of dower.

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Having received the rents and profits, and mingled the same with her estate, and no election having been made on behalf of her estate, whether her share of the rents or interest on the legacy would be claimed, in this proceeding, the court will allow the rents and not the interest.

A widow may be excluded from her legal right to dower, and be put to her election, by an express declaration to that effect in the will. 2 Williams on Executors, 1445; 2 Roper on Legacies, 530 and 809 (3d ed.); 4 Kent, 57, 58; Kinsey v. Woodward, 3 Harr. 459.

Legacies are not payable until after the expiration of one year from the decease of the testator, and the legatee is not entitled to interest on the legacy within that time. Therefore, Margaret Dolbow's estate is not entitled to be indicted with payment of the \$50 legacies except from the expiration of one year from the death of King Dolbow; that is, one year less than the claim made by the Darlington executor. So, also, as to the interest on the fund of \$5,000 bequeathed to the trustee for her benefit for life. The interest on this fund was due her only from one year after the decease of King Dolbow. Rev. Code, chap. 89, §§ 36, 37, p. 679.

The direction for the sale of real estate contained in the will of King Dolbow worked an equitable conversion from the death of the testator. A court of equity will always consider that as done which ought to have been done.

The above principle was established as to equitable conversion, even when the direction for sale was not to

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be executed until after the determination of a life estate granted in the land to be sold. To same effect — *Sharpley v. Forwood*, Exr., 4 Harr. 336.

It follows, as the result of the theory of equitable conversion, that the executor is entitled to the rents and profits of the real estate from the death of King Dolbow to the day of sale, and in this proceeding the court will direct that his estate be reimbursed as to the same from whomsoever of the parties in the cause as have received them.

In the case of *In re Stevenson*, 2 Del. Ch. 197, the direction to convert the whole estate, real and personal, showed such an intention to exclude the heir-at-law from receipt of the rents as to counteract the common-law presumption as to his right thereto.

The claim made on behalf of some of the defendants that the Statute of Limitations interposes a bar to the decreeing of an accounting by them with the complainant for any goods and chattels, or moneys received, more than three years prior to the filing of the bill, is clearly untenable: First, the statute does not apply to such a cause in equity; and, second, because if it did apply, the cause of action did not accrue to the complainant within three years of the filing of the bill, to-wit, when the second will was probated and letters of administration with the will annexed granted thereon to the complainant.

Act of Limitation does not begin to run until there are parties capable of suing and being sued. Where a cause of action arises after a person's death, the act does

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not begin to run until a person is appointed to represent him.

Conwell's Admr. v. Morris' Admr., 5 Harr. 299, was a suit for a vested legacy, payable after the death of the life tenant, brought by an administrator of legatee who had died during the life tenancy. The administrator was not appointed until more than three years after the death of the life tenant. Held, that the act did not begin to run until the administrator was appointed.

In Dodd's Admr. v. Wilson, 4 Del. Ch. 399, it was held that a court of equity has full power, when necessary for the protection of equitable rights of the party, to restrain his adversary from setting up an inequitable defense, as from prosecuting an inequitable action.

The case of Fishnich v. Sewell, 4 H. & J. 393, was an action of trover for a slave and her children. A minor died in 1775 owning a slave, which remained in possession of her stepfather until his death, and then by his will the slave and her issue were devised by him to the defendant. In 1812 letters of administration were taken out upon the estate of the minor and the action brought—plea, Statute of Limitations. Held, the action would lie.

The delay in taking out letters having been sufficiently explained, and as no right of action rested in any person to sustain an action before letters of administration granted to plaintiff, the act could not begin to operate until the letters granted and until demand and refusal.

Argument for defendant.

W. Saulsbury, for The Equitable Guarantee & Trust Co., and others of the defendants.

So far as the Trust Company, Mary A. H. Dolbow, Henry E. Dolbow, Helen H. Dolbow and John K. Dolbow are concerned, this case is easily disposed of, they being almost simply formal defendants, the only reason for their having been joined being to determine whether they are entitled to interest on the legacies bequeathed them from the date fixed for payment up to the time when they were actually paid to the trustee.

As to the other defendants named, Mary Ann Hoffman and John K. Dolbow, they are more than formal defendants, the complainant seeking to collect by means of this suit moneys received by them from the tenants of several properties devised to them by the will of Margaret Dolbow, their mother, during the time they believed the properties to be actually their own, before the production and probate of King Dolbow's second will.

There are just set-offs against those claims, even admitting them to be proper claims, which would undoubtedly be allowed even in a court of law, namely, the sums expended by them in taxes and repairs upon said properties.

On the other hand, however, this court has plainly no jurisdiction of the cause in hand. There must be an absence of an adequate legal remedy in order for equity to take cognizance of a cause, and not only is there a sufficient legal remedy, if there be any proper complaint whatever, in the present case, but it must be noted that

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the bill itself does not even allege the absence of such a remedy. Is it not significant that this very customary and necessary averment of the want of an adequate legal remedy is omitted?

A. Higgins, for Thomas Darlington, executor, defendant.

William C. Spruance, as administrator of King Dolbow's second will, not having any interest or estate whatsoever in his testator's land but merely a power to sell the same, cannot recover any of the rents received therefrom or any amount for the use and occupation of any portion thereof, as the legal estate, prior to the execution of the power, was vested in King Dolbow's heirs, and a totally different condition arises as regards the account.

A power of sale, however explicit, does not of itself give the legal property; and when a testator directs his executors to sell, until the sale is effected, the land descends to his heirs-at-law.

Chancellor Kent states the law in the following manner: "A devise that executors shall sell, or the lands shall be sold by them, gave them but a power. A devise of the land to be sold by the executors confers a power and does not give any interest." 4 Kent's Com. 365.

And after further discussion of the subject: "The general conclusion would seem to be that, as a general rule, every express trust created by will to sell lands

Argument for defendant.

carries the fee with it, but if the executors be not also empowered to receive the rents and profits, they take no estate, and the trust becomes a power without interest."

The distinction resulting from the authorities appears to be this, that a devise of the land to executors to sell passes the interest in it, but a devise that executors shall sell the lands, or that lands shall be sold by the executors, gives but a power. An eminent writer (Sugden) has concluded, from an examination of all the cases, that even a devise of land to be sold by the executors, without giving the estate to them, will invest them with a power only, and not give them an interest. 1 Williams on Executors, 578.

In the case at bar, King Dolbow in and by his last will, directed his land to be sold by his executors in the words following:

"Item. All the rest, residue and remainder of my estate of whatsoever kind and wheresoever the same may be, I direct my executor hereinafter named to sell and dispose of the same to the best advantage at his discretion."

In the case of Lockwood v. Stradley, 1 Del. Ch. 298, one Thomas Candy, by will, directed that his executors thereafter named should sell and dispose of all his real and personal estate, wheresoever or whatsoever, at such time or times as they, or the survivors of them, could do it to the best advantage, and either at public or private sale, as he or they might see or think best, in their or his discretion (almost the exact wording of King Dolbow's will), and it was held by Chancellor Ridgely:

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“That under the provision, no estate passed to the persons named as executors but that the real estate descended to the heirs-at-law of the testator.”

In *Greenough v. Welles*, 10 Cush. 571, it was held by Bigelow, J. (pp. 577, 578), that, in the absence of a devise of the fee to the executor directed to sell the lands, it vested until the sale and conveyance by the executor in the heirs-at-law.

In *Hilton v. Kenworthy*, 3 East, 553, it was held by Lawrence, J., as follows:

“A power of sale does not of itself give the legal property. Where a man directs his executors to sell, till sale the land descends to his heir-at-law and he may enter.” So says Lord Coke, *Coke on Littleton*, 236, a.

In *Warneford v. Thompson*, 5 Ves. Jr. 513, it was held by the Master of the Rolls that where there is a power under the will to sell lands, until that power is executed, the estate descends to the heirs-at-law, but as soon as the power is executed, the legal estate is in the vendee.

WOLCOTT, CHANCELLOR.—King Dolbow, late of the City of Wilmington, in New Castle County and State of Delaware, died on the 9th day of July, A. D. 1881, leaving to survive him a widow, Margaret Dolbow, and three children, namely: Mary Ann Hoffman, John K. Dolbow and William H. Dolbow, and five grandchildren, namely: Mary H. Dolbow, Hattie Moy and Henry E. Dolbow, minor children of the said William H. Dolbow, and Helen H. Dolbow and John Edgar Dolbow, minor children of John K. Dolbow.

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After the decease of the said King Dolbow, to-wit, on the 26th day of July, A. D. 1881, a certain paper writing, bearing date the 19th day of August, A. D. 1872, was proved before and allowed by the register of wills in and for New Castle County aforesaid, as and for the last will and testament of the said King Dolbow, deceased; and letters testamentary thereon were granted to the said Margaret Dolbow, one of the executors therein named (the said John K. Dolbow, the other executor therein named, having renounced said executorship).

By this will or paper writing, the said King Dolbow gave to his daughter Mary Ann Hoffman, \$100 absolutely; to his son William H. Dolbow, \$10 absolutely, and to each of his three children, Mary A. H. Dolbow, Hattie A. Dolbow and Henry E. Dolbow, the sum of \$50 per annum, to be paid for their maintenance, respectively, until each should attain the age of sixteen years. He also gave to his brother John Dolbow, who predeceased him, the sum of \$50 per annum during his life. He also gave to his son John K. Dolbow absolutely his two stalls in the Fourth Street Market House, situated in the City of Wilmington aforesaid. The remainder of his estate, real and personal, he gave to his wife absolutely.

The said executrix proceeded to administer the estate of the said deceased according to the directions of the said will. She caused an inventory and appraisement of the household goods to be made and filed in the office of the said register of wills, the appraised value being

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\$263.50. She also passed an account before the register which showed that she had paid the debts of the deceased, and the funeral expenses, which, together with commissions and fees, amounted to \$977.80.

The residue of the estate of said deceased consisted of seventy-nine shares of Union National Bank stock, a mortgage of \$2,000, owed by William Preston, and certain real estate which he gave to his wife. From the death of her husband to the time of her death, she collected all the income that had accrued on said stock and mortgage, amounting to \$2,528.63, which, together with the rents derived from the real estate, including the estimated rental value of the property occupied by herself, amounted to \$6,025.

Margaret Dolbow died February 4th, A. D. 1888, leaving a last will and testament, dated February 7th, A. D. 1875, which, with the codicils thereto, was duly proved before the register February 13th, A. D. 1888, and letters testamentary thereon were in due form of law granted to Thomas Darlington, the executor therein named.

In and by the said last will and testament of the said Margaret Dolbow, she, among other things, bequeathed the said household goods of the late King Dolbow, deceased, to certain of her children and grandchildren, to whom the said Thomas Darlington, executor, delivered the same pursuant to the directions contained in the will of the said testatrix. And from the death of the said Margaret Dolbow to November 1st, A. D. 1888, her children, acting as devisees under her will, collected

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the rents from the real estate as she did in her lifetime.

After the death of the said Margaret Dolbow, to-wit, on or about the 1st day of November, A. D. 1888, another paper writing purporting to be the last will and testament of the said King Dolbow, deceased, bearing date the 1st day of January, A. D. 1886, was discovered and produced and filed in the office of the register aforesaid, which, by due course of law, was established as the last will and testament of the said King Dolbow, deceased. And afterwards, to-wit, on the 12th day of June, A. D. 1889, letters of administration, with the will annexed, were duly granted thereon to William C. Spruance (Edward T. Bellah, the executor named in the said will, having renounced the executorship).

The said testator, King Dolbow, in and by his said last will and testament, bearing date the 1st day of January, A. D. 1880, after directing the payment of his debts and funeral expenses, bequeathed to Edward T. Bellah the sum of \$5,000, in trust, to invest the same and collect and pay the income thereof to the testator's wife, the said Margaret Dolbow, during her life, and at her death to pay the said sum of \$5,000 to the testator's five grandchildren, namely, Mary Dolbow, Hatty Dolbow, Henry Dolbow, Ellen Dolbow and Edgar Dolbow, in equal shares; and did declare that the provision in behalf of his wife should be in lieu of her dower. And the said testator, in and by his said will, did direct that all the rest, residue and remainder of his estate should be sold and disposed of by his executor, and that the

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proceeds arising from the same should be divided by him in three equal parts or shares, and he bequeathed one of said parts or shares to Edward T. Bellah, in trust, to hold the same and apply and pay the income thereof to the said Mary Ann Hoffman during her life, and at her decease, to divide said part or share among the said five grandchildren of the testator, share and share alike; and the said testator did further bequeath one other of said parts or shares to the said Edward T. Bellah, in trust, to apply and pay the income thereof to the testator's son, William H. Dolbow, during his life, and at his decease, to divide said part or share, in equal shares, among the children of the said William living at the time of his decease, and if at his death any of his children should be dead, leaving issue, the said issue to take their parent's share, and if at the death of the said William, all of his children should be dead, leaving no issue, then said part or share should go to his next of kin or the heirs of the said William. And the said testator did bequeath the other of said parts or shares to the said Edward T. Bellah, in trust, to hold the same and apply and pay the income thereof to the testator's son, John K. Dolbow, during his life, and at his decease, to divide said part or share in equal shares among the children of the said John living at the time of his decease, and if at his death any of his children should be dead, leaving issue, then such issue should take their parent's share; and if at the death of the said John, all of his children should be dead, leaving no issue, then said part or share should go to the next of kin or heirs of the said John.

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The Equitable Guarantee and Trust Company, on the 3d day of February, A. D. 1890, was appointed trustee for the legacies or sums of money bequeathed to Edward T. Bellah, as aforesaid, he having refused to accept said trust.

The complainant, administrator of the said King Dolbow, as aforesaid, subsequently sold and converted into money all of the estate of the said testator accessible to him, and, on the 17th day of January, A. D. 1890, passed his first account before the register aforesaid, showing an unappropriated balance in his hands of \$17,853.25. Out of this sum he retained \$853.25 to meet the expenses of litigation and other contingencies incident to the settlement of the estate of the said testator, and paid the remainder, \$17,000, over to the trustee. In the balance shown is included the rents of the real estate, which accrued between the granting of letters of administration to William C. Spruance, the complainant, and the time of the conversion of the same into personalty.

The first question to be decided is, whether the entire subject-matter of this controversy properly falls within the jurisdiction of this court. Whatever the rights or interest involved in the dispute between the complainant and trustee may be, they are strictly equitable, and are, therefore, exclusively a subject of equity jurisdiction. And though the matters in controversy between the complainant and the remaining respondents may be of a legal nature, and perfectly capable of being enforced in a legal tribunal, yet, if they are so connected with the

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trust fund that it may be affected by the result of this suit, it follows as a logical consequence that all the respondents are not only proper but necessary parties to this proceeding. To determine otherwise, assuming such connection to exist, would drive the parties to a repetition or multiplicity of suits for the enforcement of their respective rights, which is contrary to the principles of equity jurisprudence.

To bring out this proposition more clearly, let us see briefly what some of the contentions of the respondents are. It is contended that the title to the real estate of King Dolbow at his decease devolved upon his heirs-at-law, subject to the exercise of the power to convert the same into money, and that pending the repose of such authority, they were entitled to the rents and profits thereof. If this be true, the complainant had no right to collect any part of the rents that may have accrued prior to the sale, and turn them over to the trustee. It is admitted that he did collect such rents and mix them with the assets in his hands, which to that extent increased the fund that he paid to the trustee. The heirs-at-law of King Dolbow, deceased, therefore, in view of their contention, claim from the complainant a sum equivalent to the rents collected and received by him.

It is also contended that the executor of Margaret Dolbow, deceased, is entitled to be reimbursed by the complainant, for the money she expended during her lifetime in payment of the debts of her deceased husband.

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It is further contended that certain of the legatees under the will of the late King Dolbow, deceased, should be paid the balance that may be found to be due on their respective legacies.

If the claims presented by these contentions are allowed, it is quite apparent that the amount remaining in the hands of the complainant is not sufficient to satisfy them. And as the complainant under the circumstances is not personally liable to the persons making such demands, a part of the fund represented by the trustee will have to be taken to supply the deficiency.

Now, as the trust fund cannot be made the subject of litigation, except in a court of equity, those claims or rights, whose maintenance or protection threaten its diminution, are necessarily drawn into the same jurisdiction in order that full and complete justice may be done to all concerned.

But it is insisted that as the complainant had an adequate remedy at law respecting the claims made by him upon certain of the respondents, he has no standing in this court, admitting that they are valid and subsisting demands. It is true that the absence of such a remedy has been held by some of the most eminent judges and text writers to be the test of equity jurisdiction, but this view no doubt originated more in a desire to avoid a collision between courts of equity and common-law jurisdiction than in a desire to subserve the ends of justice. Consequently, it has never been accepted and recognized as a general rule of law. Whether this is true or not, the consensus of judicial opinion now is that the jurisdiction of courts of equity is not entirely

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determined by the absence or presence of adequate legal remedies, though either is not an unimportant element in aiding the solution of such a question.

The facts and the circumstances of the case at bar, for the reasons already stated, furnish a very clear illustration of the hardships that might result, if the presence of an adequate remedy at law were regarded as an insuperable barrier against the exercise of equitable jurisdiction in such cases. As a matter of convenience to the courts and the lawyers, the adoption of such a rule would be a very excellent thing, in that it would relieve them of very many delicate and embarrassing questions of a jurisdictional character. But it must be remembered that the object to be secured in formulating rules of practice and enunciating principles of law is not so much the convenience of courts and lawyers as it is the advancement or promotion of justice between suitors.

The conclusion, therefore, reached by me is that I can see no reason why this court should not take jurisdiction of all the matters in dispute between any and all the parties to this suit, so far as the adjudication thereof may affect or threaten the integrity of the trust fund.

The next question that arises is: whether the executor under King Dolbow's will, or the administrator c. t. a. had a right to receive the rents in controversy?

The only source whence this right is claimed to be derived, is the clause or item in the will which simply directed the executor to sell the real estate, and divide the proceeds of the sale thereof in the manner prescribed therein. This being then a mere direction to sell, it

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vested no estate whatever in the executor. It is strictly a naked power uncoupled with any interest. Neither did any estate or interest in the lands, *qua* lands, pass to the legatees or objects of the testator's bounty as such, because their interest under the terms of the will attached only to the fund produced by the sale of the property. Therefore, between the death of the testator and the sale, the title to the fee descended to his heirs-at-law, and remained in them until it was divested by the execution of the power conferred upon the executor. During that intermediate period then, the heirs-at-law were entitled to the rents and profits arising from the real estate without let or hindrance from any source. This conclusion, therefore, eliminates to a very large extent the question of rent in the settlement of the various accounts between the parties to this proceeding. In this connection it is only necessary to state that the complainant must account to the heirs-at-law of King Dolbow, deceased, for the rents received by him, less the costs and expenses of collecting the same.

Another question raised is, whether the estate of Margaret Dolbow, deceased, should be credited with the amount paid by her as legacies to the parents of the minor legatees under the first will of the late King Dolbow, deceased.

The only person to whom payment can be legally made of money belonging to a minor, is to his or her guardian. In this case there is no allegation that the money paid to the parents of these legatees on their account was improperly expended. They, however, were

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not the parties legally competent to receive such legacies, and could not, therefore, execute a valid discharge or acquittance for the same. Grant that the money in this instance was judiciously used, yet there are not a few parents who, if such a privilege were granted to them, would expend the money belonging to their children in such a way as would not be beneficial either to their physical or intellectual welfare.

The safe rule or practice to establish in such cases, is to require a strict adherence to the law in every instance where it is practicable and not inconsistent with the necessities of humanity. Therefore, the sum paid in the discharge of such legacies must be disallowed as a credit to the estate of Margaret Dolbow, deceased. If, however, Margaret Dolbow, as executrix of her late husband, had paid these legacies to parties authorized to receive the same, her estate would have been entitled to credit therefor, under section 12, chapter 89 of the Revised Code, which declares that all the lawful acts of such an executor or administrator shall be valid. Neither does this provision of the Code apply to the claim made on account of the erection of the monument at the grave of her deceased husband, because the expenditure therefor was not authorized by law.

The claims for repairs and taxes cannot be allowed for the reason that she expended the money in that behalf on her account as the owner of the property, out of the rents which she received therefrom.

The executor of Margaret Dolbow also claims that the amount expended by her in payment of the debts of her deceased husband should be a further credit to her estate. At first I was inclined to the opinion that

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her estate was not entitled to such a credit upon the ground that the rents which came into her hands should under the statute be treated as assets for the payment of debts. Upon reflection, however, I have concluded otherwise, inasmuch as nothing appears to show that she received such rents in her representative capacity. Acting under the belief that she was the owner of the real estate, the presumption is, that she collected and received them as such owner and not as executrix. Therefore, until something is shown to rebut such presumption, it must prevail. Under the circumstances, the only person to whom she was accountable for the rents thus received, were the heirs-at-law of her deceased husband.

The claim is also made by Margaret Dolbow's executor that her estate is not responsible for the return of the goods and chattels mentioned, or the payment of their equivalent in money. But this is incorrect. Their acceptance under the first will of King Dolbow operated only as a release of her official liability on account of the use and possession thereof during her life, and the disposition of the same by her last will and testament. While they remained in her hands, or in the hands of those who hold them as a gift, they are liable to be taken as a part of the estate of King Dolbow under his last will and testament. They could only pass beyond the control of his legal representative where the rights of innocent persons based upon a valuable consideration had intervened. Hence, the appraised value of such goods and chattels must be treated as a just charge against her estate.

There is still another question in regard to the rights of the executor of Margaret Dolbow, deceased, caused

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by her dual relation in her lifetime to the estate of her deceased husband as legatee and doweress. In view of the innocent concealment of the last will of King Dolbow, until after the death of his widow, she had no opportunity to elect whether she would take under the will or under the law. As she was deprived of that privilege by circumstances over which she had no control, the court will make the election most advantageous to her interest. In courts, both of law and equity, the rights of widows are favored. It is conceded that the annual income secured to her by the will amounted to more than she would have received out of the estate of the deceased under the law. It is, therefore, held that the widow took only under the will, and nothing under the law, and the trustee should pay to her executor the interest upon the trust fund of \$5,000, from the time of the death of King Dolbow to the time of her death; and the trustee should also pay to the five grandchildren of King Dolbow interest upon their respective portions of said trust fund from the time of the death of Margaret Dolbow to the time of the payment to them of the principal thereof.

The Statute of Limitations which has been invoked by her executor can have no application in this case, granting that it is available in a court of equity. Until there are parties capable of suing and being sued, the statute does not run. This is too well settled to admit of doubt or argument.

In this case there could be no proper party to represent the estate of the testatrix until after the discovery and establishment of the second will, and letters of ad-

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ministration with the will annexed were duly granted thereon. Consequently no cause of action which the complainant had could have been affected by the statute even in a court of law, if it had been prosecuted within three years after the date of his appointment. Until then no cause of action had accrued.

Now, as to the parties who took under that will, in this court at least, they are also saved from the operation of the statute during the concealment of the will, though on a somewhat different ground. They were unavoidably ignorant of their rights. They cannot be chargeable with either negligence or carelessness, as no amount of diligence would have aided them in the discovery of the document from which their rights are derived. There was nothing to awaken such diligence in the minds of reasonable persons. Their sleep then was not the slumber of the foolish. While the first will stood on the record unchallenged, they acquiesced in its provisions as the foundation and measure of their respective interests in the estate of the deceased testator. They did so because there was nothing either of record or outside of the record to show a different testamentary intention on his part. To permit the Statute of Limitations to be interposed to prevent the parties from adjusting themselves to the changed conditions produced by the accidental finding of the second will would be carrying it beyond the purpose it was intended to serve. A court of equity will not allow such an inequitable use to be made of such a wise and beneficial statute.

Let the decree be drawn in conformity with this opinion.

Syllabus.

CHARLES S. MORRIS et al. v. BOARD OF PILOT COMMISSIONERS, a Corporation of the State of Delaware, et al.

New Castle, September Term, 1894

Pilots — board of commissioners of; **Powers** — what may be implied, and what must be expressed in the act; Can not forfeit licenses without giving opportunity for hearing; May make rules, but not orders; Distinction between; Power of the board over the boats; What are combinations to prevent pilots from performing their duties — equity will enjoin when an indefinite revocation of a license is illegally ordered.

1. A refusal by a number of pilots who own and operate their own pilot boat, and who have the boat properly manned and equipped to render good service, to allow a pilot designated by the pilot commissioners to cruise on her, is not a combination to prevent a person from executing the duties of a pilot within act of April 5, 1881, providing for the forfeiture of the license if a pilot enter into such a combination.
2. The act of April 5, 1881, and its supplements, creating the Board of Pilot Commissioners and empowering it to forfeit the license of any pilot entering into a combination to prevent another pilot from discharging his duties, requires that the party charged with such a combination shall have an opportunity of being heard; and no order or decree of the board before conviction and after opportunity given for hearing, shall work such a forfeiture; nor is an order of the board inflicting as a penalty for such a combination an indefinite revocation of the license, lawful, it being the first offense alleged and the statute expressly providing a forfeiture for three months only in such a case.

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3. The power vested in the Board of Pilot Commissioners to make rules for the government of pilots, and to decide differences, carries with it the incidental power to enforce the same by the imposition of reasonable pecuniary penalties, without any express grant of power to that effect. But the right to inflict a forfeiture as a penalty, must be plainly given, and cannot be derived from usage or raised by implication.
4. Pilot boats, though owned and managed exclusively by certain of the pilots, are to a certain extent dedicated to the public service, and the private property rights of their owners must be made subservient whenever the public good requires it, but no further. The Board of Pilot Commissioners has, therefore, the implied right to make such rules and regulations concerning boats in the service as would be conducive to the general interest, but not otherwise; and the allotment by the board of a pilot to a boat already properly manned and equipped is without its power.
5. Under the clause authorizing the Board of Pilot Commissioners "to make rules for the government of pilots," etc., the orderly course of procedure is to make general rules in pursuance of that power, and the assignment of a pilot to one of the boats in the pilotage service without having first made a general rule on the subject, partakes of the nature of an order and not a rule and is not within the terms of the act.
6. The words "rule" and "order," when used in a statute, have a definite significance. They are different in their nature and extent. A rule, to be valid, must be general in its scope and undiscriminating in its application; an order is specific and limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made.

Syllabus — Statement — Argument for complainants.

7. The Court of Chancery will enjoin the Board of Pilot Commissioners from revoking a license where the ground upon which the revocation is threatened is not one specifically provided for by the statute creating the board.
8. While the general doctrine is that equity may relieve against forfeitures declared by contract but not against those declared or unauthorized by statute, yet when they are not expressly declared or authorized, equity will relieve by the interposition of its injunctive power.

INJUNCTION BILL.— Action by Charles S. Morris and others against the Board of Pilot Commissioners to enjoin the defendants from revoking the plaintiffs' licenses. A full statement of facts will be found in the opinion of the Chancellor.

Bradford & Vandegrift, for complainants.

There is no justification or excuse for the attitude assumed by the Board of Pilot Commissioners in this case. It is unreasonable and arbitrary in the last degree and in utter disregard of the rights and interests of property-owners.

The boat Thomas Howard is not the property of the State of Delaware or of the Board of Pilot Commissioners, whatever may be said upon the subject of the police powers of the State or of the doctrine of the case of *Munn v. Illinois*, 94 U. S. 113.

In respect to the doctrine of police power and the affecting of private property with the public use, something will be said later; but the admitted facts show conclusively how utterly unreasonable is the proposed action of the Board of Pilot Commissioners in this case.

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No complaint has been made by the board or by anyone that the boat Howard is not successfully, properly and diligently managed in the pilotage business, or that the said boat is not well equipped and manned, or that it has not a sufficient number of pilots to fully and satisfactorily perform its duty as a pilot vessel.

On the contrary, the Board of Pilot Commissioners, through its general demurrer, admits without qualification the statement contained in the bill of complaint as amended, "that at the time of the said application of the said John B. Merritt to the said Board of Pilot Commissioners, as aforesaid, and ever since, and now, the pilot boat Thomas Howard was, has been, and is well and sufficiently manned with duly-licensed pilots for the full and satisfactory performance of its duties as a pilot boat."

The board further admits the allegation that "the sole object of the said defendant in insisting that the said Merritt should be received upon the said Howard as aforesaid, was to give employment to the said Merritt as pilot, to the end that he might render pilotage service; the said Merritt not then being employed upon any pilot boat."

The board further admits the allegation that "there was much unwillingness on the part of the Delaware pilots employed on the several pilot boats, then in service on the bay and river Delaware, to receive the said Merritt to cruise as a pilot on anyone of said pilot boats; and the said defendant, the Board of Pilot Commissioners, finally determined by lot whether the said Merritt should be received as pilot on the said boat Thomas How-

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ard, or another of said boats named Thomas F. Bayard; and the said boat Howard having been so determined upon by lot, the said defendant insisted as aforesaid that the said Merritt, against the will and consent of a majority of the owners of the said boat Howard as aforesaid, should be received to cruise upon said boat as aforesaid."

The authority of the board clearly does not extend to the placing of Merritt on board of the Howard against the will of its owners, or to the threatened revocation of their licenses for refusing to receive Merritt under the circumstances disclosed in the case.

The authority of the board is statutory, and is, 1st. To "grant licenses to persons to act as pilots in the bay and river Delaware." 2d. To "make rules for their government while employed in that service;" and 3d. To "decide all differences which may arise between masters, owners and consignees of ships or vessels and pilots, except in cases hereinafter excepted." 16 Del. Laws, 494.

Applicants for pilot's licenses are compelled to pass an examination to determine their fitness, and licenses when granted "shall be in force for one year from the date thereof until pilots respectively shall next after the expiration of the year arrive with any ship or vessel at any port," etc. 16 Del. Laws, 495.

It is further provided that if any pilot shall for two weeks unlawfully neglect to execute a pilot's duties, he shall forfeit his license; and further, that if any pilot shall enter into any combination with the view of preventing any pilot from executing his duties, the license of the former shall be forfeited. 16 Del. Laws, 496.

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In this case, there is no neglect on the part of the owners of the Howard to execute their duties as pilots. Indeed, the contrary appears upon the facts admitted by the demurrer. Nor is there any suggestion in the records of any combination on the part of any of the owners of the Howard to prevent Merritt from exercising a pilot's functions.

It has been argued that the power "to make rules for their government while employed in that service," includes that authority. But it is submitted that any such construction of the statute would be most unreasonable and clearly improper.

Such a construction must not be put upon the power as would render its exercise not only altogether arbitrary, but also violative of the rights of property of vessel owners.

No such authority, conflicting as it would with one's exercise of his rights of property, can be held to exist, unless under the exercise by the State of its police power, or under the doctrine of dedication as laid down in the case of *Munn v. Illinois*, 94 U. S. 113.

With respect to the doctrine of *Munn v. Illinois*, it is enough to say that that doctrine is wholly without application in the present case. While it is true that the owner of property, by putting it into public use, may so far dedicate it to the public as to forbid discrimination with respect to its use, as between different members of the public, so long as it continues to be used by the public, there is no principle recognized in that case, or in any case decided by any intelligent tribunal, which will

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compel the owner of property to permit others to force themselves into a partnership or *quasi* partnership relation with him against his will, to carry on the enterprise on which he has embarked.

The contention on the part of the solicitors for the defendant that because the employment of a vessel as a pilot boat is a public service, the owners of the boat are compelled to take, against their will, other pilots on board their boat unnecessarily, is just as absurd and illogical as to have contended in *Munn v. Illinois*, that the warehouseman must not only serve the public indifferently at prescribed rates, but must also, against his will, associate with him in carrying on his business, any person that said board of commissioners might see fit to impose upon him.

What the court held in *Munn v. Illinois* was, that so long as the warehouseman maintained his warehouse as a public building, he must serve the public indifferently according to prescribed rates; and that to that extent he had dedicated his building to public use.

Then if the doctrine of *Munn v. Illinois* does not apply to the case, the authority, if it exists at all, must be embraced in the exercise of the police power.

If the Legislature had ever had in contemplation the authority contended for by the solicitors for the defendant, it is inconceivable why it should have omitted to expressly provide for the control, regulation or ownership of vessels employed in the pilotage service. Absolutely no reason entitled to any weight has been advanced to justify the contention on the part of the defendant. The defendant's solicitor contended that if

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the owners of a pilot vessel had the right to decline to receive a stranger coming to cruise on their vessel as a pilot, the shipping interests would be largely at their mercy, because they, by preventing competition among pilots, could raise the rates of pilotage.

The conclusive answer to this objection is found in the fact that the pilotage rates are wholly beyond the power of pilots to alter or change in any respect, being expressly declared and fixed by section 18 of the Act creating the Board of Pilot Commissioners. 16 Del. Laws, 499.

The authority of the board to decide all "differences which may arise between masters, owners and consignees of ships or vessels, except in cases hereinafter excepted" has no application, it is submitted, to a case like the present for the reason that the proviso at the end of section 1 of the Pilotage Act (16 Del. Laws, 494) clearly shows that the differences referred to are disputes with respect to moneys claimed as between masters, owners and consignees of ships or vessels on the one hand, and pilots on the other.

Even if the appeal provided for in the Pilotage Act could be considered as applicable to a case like the present, such appeal would be only a cumulative remedy and not exclusive of the jurisdiction of this court. Sutherland on Statutory Construction, § 399.

But the provision relating to the appeal is that "on such appeal the like security shall be entered and the like proceedings had as in the case of an appeal from the judgment of a justice of the peace for a debt or demand not exceeding \$100."

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As already stated, this statutory remedy was evidently intended to apply only to the cases of pecuniary demands. Otherwise the provision as to security as in case of a debt not exceeding \$100, would be altogether unmeaning.

The provisions conferring upon the Board of Pilot Commissioners authority to make rules for the government of pilots, while employed in the pilotage service, must receive a reasonable construction.

There is a well-settled distinction between acts of a Legislature authorizing the doing of unreasonable things, and an ordinance, rule or by-law of a board of public officers or of a municipality while undertaking to act under a power generally conferred upon any given subject, to do unreasonable things.

In the former case, the action will be supported unless it violates some constitutional provision; but in the latter case, the action of the municipality or board will not be supported, but will be declared invalid and void as unreasonable. 1 Dillon on Municipal Corporations, §§ 319, 328; *Site v. Murphy et al.*, 49 Ohio St. 536; *Clinton v. Philips*, 58 Ill. 102; *Commonwealth v. Turner*, 1 Cush. 493; *Trustees of Schools v. People*, 87 Ill. 303; *Dayton v. Quigley*, 23 N. J. Eq. 77; *Barling v. West*, 29 Wis. 307.

L. C. Bird, for defendant.

The question to be decided in this case is, whether the Board of Pilot Commissioners, a corporation created by an act of the Legislature of the State of Delaware, had a right to make and enforce a rule directing that

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one John B. Merritt, a pilot duly licensed by said board to be allowed to cruise upon the pilot boat Thomas Howard, said pilot boat being at the time actually engaged in the pilotage service, and whether an injunction will lie in this case.

The respondent claims:

I. The complainants are not entitled to an injunction, since they had an adequate remedy for any supposed grievances provided by section 1 of the act of April 5th, 1881, which provides, "that if any person whomsoever shall conceive himself aggrieved by any decision or penalty made, given and imposed by the said board, such person may, except in the cases hereinafter excepted, within six days appeal therefrom to the Superior Court of either of the counties of this State, and on such appeal, the like security shall be entered, and the like proceedings had as in the case of an appeal from the judgment of a justice of the peace for a debt or demand not exceeding \$100." Vol. 16, Del. Laws, 494.

II. The Board of Pilot Commissioners were fully authorized and empowered by the laws of Delaware, to make the rule in question in this suit, and said rule is reasonable and necessary to the pilotage service.

The rule was for the government of the pilots. The act of April 5th, 1881, creating said Board of Pilot Commissioners, provides in section 1, "And the said board of pilot commissioners, three of whom shall be a quorum, when met, shall have full power and authority under the limitations hereinafter prescribed, to grant licenses to persons to act as pilots in the bay and river Delaware,

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and to make rules for their government while employed in that service, to decide all differences which may arise between masters, owners and consignees of ships or vessels, and pilots, except in cases hereinafter excepted." Vol. 16, Del. Laws, 494.

The refusal of the complainants to permit the said Merritt to cruise upon the Howard was the result of a dispute between pilots over which, by the said act of Assembly, the Board of Pilot Commissioners have full jurisdiction and control. Vol. 16, Del. Laws, 494. See, also, section 1 of a supplement to the act, entitled "An Act regulating pilots and pilotage of and in the bay and river Delaware." Chap. 555, vol. 17, Laws of Delaware.

The reasonableness of the rule and the wisdom of the Legislature in investing the Board of Pilot Commissioners with authority to make it, is perfectly apparent when we consider the possibility of combinations entered into among certain pilots with a view of preventing other pilots from performing their duties. These combinations are expressly forbidden by section 4 of the act of April 5th, 1881. Vol. 16, Delaware Laws, 496.

Authority by the Board of Pilot Commissioners over the persons and property of pilots while actually engaged in the pilotage service, is absolutely necessary to the efficiency of pilotage service.

III. The laws of Delaware upon the subject of pilotage are in all respects constitutional and valid.

The States have the right to legislate on the subject of pilotage, and the jurisdiction of the several States

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over their own pilots is expressly recognized by the act of Congress passed August 7th, 1789. U. S. R. S. 818, § 4235.

And has been repeatedly affirmed by the Supreme Court of the United States. *Cooley v. Philadelphia Board of Wardens*, 12 How. 299; *ex parte McNeil*, 13 Wall. 236.

The acts of Assembly in Delaware in question in this suit are not unconstitutional or invalid on the ground that they destroy, abridge, or interfere with the right of private property. The State in the exercise of its police powers, in legislating upon the subject of pilotage, has the unlimited right to control not only the persons, but the property of pilots, while engaged in the pilotage service. The pilot boats actually engaged in the service and necessarily under the control of the pilots who cruise upon them, are essentially a part of the pilotage service. Without them the service could not exist.

The whole object of the pilot laws, viz.: the creation and fostering of a well and efficient system of pilotage, would be defeated if the Board of Pilot Commissioners created by it did not have the right, by proper rules, to govern and control not only the pilots licensed by it, but also the pilot boats and other property actually used by said pilots in the pilotage service.

In the case of *Munn v. Illinois*, 94 U. S. 113, the question was, whether an act of the Legislature of the State of Illinois establishing public warehouses, and regulating the shipment and transportation of grain by railroad companies, and the provision of the Constitution of that State regulating the subject, were in conflict with the Federal Constitution.

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The Constitution of Illinois provides that "all railroad companies receiving and transporting grain in bulk, or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignees, or the elevator or public warehouse, can be reached by any track owned, leased, or used, or which can be used by such railroad company; and all railroad companies shall permit connection to be made with their track, so that any such consignee, and any public warehouse, coal bank, or coal yard may be reached by the cars on said railroad."

By the act of the Legislature, the warehousemen were licensed, and gave bond to the State, as pilots are required to do by the Delaware act.

The above was clearly an interference with the right of private property, and yet the constitutionality of the law was upheld. It was held that, "under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens towards each other, and when necessary for the public good, the manner in which each shall use his own property."

At page 133, the court say: "There is no attempt to compel the owners to grant to the public an interest in their property, but to declare their obligation if they use it in a particular manner." And at page 125, "Under this power, namely, the police power, a government regulates the conduct of its citizens, one towards another, and the manner in which each shall use his own property, when such regulations become necessary to the public good."

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In the case of *The State v. Almond*, 2 Houst. 612-623, 624, 625, 626, 627, 632, 633, 637 and 638, the defendant was indicted for selling intoxicating liquor contrary to the provisions of the act of the Legislature, entitled "An Act for the suppression of intemperance," passed February 27th, 1855, prohibiting the sale of intoxicating liquors for any other than mechanical, chemical and medicinal purposes, and pure wine for sacramental use, and restricting the right to sell even for such purposes to not more than three persons in each hundred in the State, and five in the City of Wilmington, to be licensed as provided in the act.

The court declared the above statute constitutional and valid, and held that legislative power was an attribute of sovereignty belonging to the people, to be exercised only by their representatives. The extent of the grant of it to the Legislature with its reservations and restrictions, are to be found only in the Constitution itself.

In an able opinion delivered by Harrington, C. J., the court, at page 632, say: "If the higher rights of life, liberty and the enjoyment of property be thus subject to the sovereign power of the State, the power to regulate the use of property to secure the enjoyment of these rights, and to promote the objects for which government is formed cannot be doubted." And at pages 637, 638: "The subjection of private property in the mode of its enjoyment to the public good, and its subordination to public rights liable to be injured by its unrestricted use, is a principle lying at the foundation of government."

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An important distinction must be made as to the claim that the Delaware pilotage laws invade the right of private property.

The rule in question in this suit operates directly upon the pilots themselves, not upon their property, or property used or controlled by them.

In *Commonwealth v. Alger*, 7 Cush. 84, it was held that an act of the Legislature of Massachusetts, establishing lines in the harbor of Boston beyond which no wharf should be extended or maintained, although it took away the right of the proprietors of flats in the harbor beyond the lines to build wharves thereon, and provided for no compensation to the owners thereof, was a valid exercise of the police power.

Shaw, C. J., in delivering the opinion of the court, said: "All property in this Commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. *Cooley's Const. Lim.* *573.

In *Commonwealth v. Tewksbury*, 11 Metc. 87, it is held, that a statute which imposes a penalty on any person who shall take, carry away or remove any stones, gravel or sand, from any of the beaches in the Town of

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Chelsea, extends to the owners of the soil as well as to strangers, and is not such a taking of private property as to render it unconstitutional and void, although no compensation is provided therein for the owners.

In *Trope v. Rutland & B. R. R. Co.*, 27 Vt. 149, plaintiff brought an action on the case for the killing of his sheep by one of defendant's locomotives, there being no cattle-guards at a farm crossing. The question in the case was, whether the defendants were bound by the provisions of the General Railroad Act of 1849 to construct and maintain cattle-guards, there being no such obligation imposed upon defendant by its charter. Held, that defendant was bound to provide proper cattle-guards.

The statute does not deprive persons of their property without due process of law. *Slaughter House Cases*, 16 Wall. 36; *Butchers' Unions Co. v. Crescent City Co.*, 111 U. S. 746; *Grant v. Courter*, 24 Barb. 232; *Met. Board of Police v. Barrett*, 34 N. Y. 667; *Stone v. Mississippi*, 101 U. S. 814-818; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 id. 650.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be maintained. *Munn v. Illinois*, 94 U. S. 123.

WOLCOTT, CHANCELLOR.—The facts in this case, as appear by the bill as amended, are substantially as follows:

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By an act of the General Assembly of this State, a corporation was created, entitled "The Board of Pilot Commissioners," in which it was provided, among other things, that "the said Board of Pilot Commissioners, three of whom shall be a quorum when met, shall have full power and authority, under the limitations hereinafter prescribed, to grant license to persons to act as pilots in the bay and river Delaware, and to make rules for their government while employed in that service, to decide all differences which may arise between masters, owners and consignees of ships or vessels and pilots, except in cases hereinafter excepted; provided, that if any person whomsoever shall conceive himself aggrieved by any decision or penalty made, given and imposed by the said board, such persons may, except in cases hereinafter excepted, within six days appeal therefrom to the Superior Court of either of the counties of this State" * * * . And it is further provided in section 4 of the act that "if any person having a license as a pilot shall for the space of two weeks refuse or wilfully neglect to execute the duties of a pilot, every such pilot upon due proof thereof shall forfeit his license; and if any pilot shall enter into any combination with a view of preventing any other person from executing such duties, every such pilot being thereof duly convicted, shall for the first offense forfeit his license as a pilot for the bay or river Delaware for the space of three months; for the second offense, for the space of one year; and for the third offense, absolutely."

The complainants are all pilots on the bay and river

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Delaware, licensed according to the provisions of the act passed in that behalf by said board of commissioners, and in order that they might prosecute with greater facility their business or occupation as pilots, they purchased and are, together with Marshall Bertrand, Thomas H. Carpenter, Harry C. Maull, Jacob Teal, James W. Marshall, and James Rutherford, the sole owners of the boat called the Thomas Howard, and since the purchase thereof the complainants have used and are now using the said Thomas Howard in the discharge of their business as pilots.

Some time prior to the 23d day of June, A. D. 1891, one John B. Merritt, a pilot on the bay and river Delaware, made application to said Board of Pilot Commissioners to assign to and obtain a place for him on some of the boats used by the pilots on said waters, for the purpose of enabling him to pursue his business as a pilot, and in pursuance of such application, the said board directed that the said Merritt be allowed to cruise on the said Thomas Howard; and subsequently, on the 23d day of June, A. D. 1891, the secretary of said board served notice as follows upon all the owners of said boat, except James W. Marshall and James Rutherford:

“ WILMINGTON, DEL., *June 23, 1891.*

“ DEAR SIR.— At a special meeting of the pilot commissioners, held to-day, on motion, it was

“ Resolved, That if the pilots of the pilot boat Howard do not comply with the rules of the board in the case

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of Mr. Jno. B. Merritt within twenty days, the license of said pilots shall be revoked.

"Yours truly,

"R. F. TOWNSEND,

"Secretary."

After the receipt of the foregoing notice, the complainants and Marshall Bertrand, Thomas H. Carpenter, Harry C. Maull and Jacob Teal, being the owners of eight-tenths of the said boat Thomas Howard, refused to comply with the said order directing the said John B. Merritt to be placed upon said boat, he having no share nor interest therein.

At the time of the application of the said John B. Merritt to the said Board of Pilot Commissioners as aforesaid, and ever since and now, the said pilot boat Thomas Howard was, has been, and is well and sufficiently manned with duly-licensed pilots for the full and satisfactory performance of its duties as a pilot boat; and that the sole object of the defendant in insisting that the said Merritt should be received upon the said Thomas Howard, as aforesaid, was to give employment to the said John B. Merritt, as pilot, to the end that he should render pilotage service, he not then being employed upon any pilot boat.

To the bill the complainants pray that the defendant be perpetually restrained from revoking the licenses of the complainants by reason of their unwillingness to take on board the boat Thomas Howard the said John B. Merritt, etc., together with the usual prayers for an answer, further relief and subpoenas.

To the bill the respondent demurred generally.

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The respondent having demurred generally, all the facts as set forth in the bill are admitted to be true.

The act of April 5th, 1881, contains three provisions, under one of which the Board of Pilot Commissioners must have acted in assigning John B. Merritt to the pilot boat Thomas Howard. These are,

First. The clause in section 1, which empowers the board "to make rules for their" (pilots) "government while employed in that" (pilotage) "service."

Second. The clause in section 1 which empowers the board "to decide all differences which may arise between masters, owners and consignees of ships and vessels and pilots, except in cases hereinafter excepted." And,

Third. The clause in section 4 of the act which provides "If any pilot shall enter into any combination with a view of preventing any other person from executing such duties, every such pilot being thereof duly convicted, shall for the first offense, forfeit his license as a pilot for the bay and river Delaware for the space of three months; for the second offense, for the space of one year; and for the third offense, absolutely."

We will consider these provisions in their reverse order.

Has any combination been shown into which the complainants had entered with a view of preventing John B. Merritt from executing his duties as a pilot? The simple fact that they refused to allow him to cruise in their particular boat can hardly be considered a combination within the intent and meaning of this provision, there still remaining to him a number of different ways in which he might have discharged these duties. He might have found employment upon one of the other

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pilot boats. He might have purchased a pilot boat of his own. Or he might have joined with other pilots in the procurement of still another pilot boat. And even if he were unable, for any reason, to avail himself of the opportunities thus left to him, it would be his misfortune and not the fault of complainants. If the refusal of the owners of a pilot boat to admit into their number any or all pilots who shall see fit to make this request, is a combination against such pilots, then what protection have the owners, or what guaranty have they of the privileges purchased with their personal means? It would be stretching the statute too far to construe such a refusal into a combination that clashes with the spirit of the act.

But even if it should be conceded that such a combination as that contemplated by the provision of section 4, just quoted, to have existed prior to the notice which was served upon certain of the complainants, threatening the revocation of their respective licenses, it nowhere appears that such pilots were ever duly convicted of such an offense. Conviction by due course of law is made by the statute a condition precedent to a forfeiture of the licenses held by those who may enter into such a combination. It has not been shown that the board gave the complainants an opportunity to be heard, so that it might determine after a full hearing (assuming for the purposes of this case that it has such power), whether or not they were guilty of a violation of the statute and had incurred the forfeiture prescribed as a penalty against such combination.

Furthermore, so far as the facts disclose, this combination, admitting it to be such, was the first offense

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of complainants. Now the notice served upon these complainants declares an indefinite revocation of their licenses, whereas the statute expressly declares that for the first offense, the penalty shall be a forfeiture of the license for three months only. Taking this view of the matter therefore, this action of the board was unsanctioned by the act of its being.

Let us now see whether the action of the board can be justified under the power given by section 1 to decide all differences between owners of vessels and pilots.

Granting now that the refusal of the complainants to allow John B. Merritt to cruise on board the Thomas Howard, was a difference between them, of which the board could take cognizance, it had no right to proceed in the way it did. The method which the board adopted of coercing submission to its decisions of these alleged differences, was by declaring a revocation or forfeiture of complainants' licenses. This, however, the board had no authority to do, inasmuch as this power was not expressly given to it by the act, or any of its supplements. The power vested in the board to make rules for the government of pilots and to decide differences carries with it the incidental power to enforce the same by the imposition of reasonable pecuniary penalties, without any express grant of power to that effect. But the right to inflict a forfeiture as a penalty must be plainly given, and cannot be derived from usage or raised by implication.

If it be insisted that the action of the board was authorized by that clause in section 1 which empowered it to make rules for the government of pilots, then the exact meaning and extent of the power thus granted must

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be considered. In doing this, two questions naturally arise:

First. Does the authority given by the act to the Board of Pilot Commissioners to make rules for the government of pilots while in the pilotage service, extend to their boats, and if so, how far?

Second. Granting for the sake of the argument that it does, did the board, in the exercise of this authority, proceed in accordance with the provisions of the act which gave it that authority?

As to the first question, it is undeniably true that the Board of Pilot Commissioners has at least a qualified authority over pilot boats. While these boats may be property of individuals, as was the case with the Thomas Howard, yet being employed in the pilotage service by their owners, they were by such act dedicated to a use or service in which the public has an interest, to which individual property rights, to the extent of the public good, are subordinate.

It is only necessary to suggest the extent and importance of the commerce carried on upon the bay and river Delaware, to appreciate the vital interest which the public has therein. Pilotage service is a necessary auxiliary to commerce, and it was to promote or increase the efficiency of that service upon these waters that the act of April 5th, 1881, was passed, whereby the Board of Pilot Commissioners was established. This board is empowered "to make rules for the government of pilots while in this" (pilotage) "service." In order to render this power effective, it must extend to the instruments of the pilots' trade or vocation. Pilot boats are, there-

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fore, subject to such proper and legal rules as the board may see fit to make.

At the same time, however, the exact extent of the interest which the public has in the pilotage service must not be forgotten. The public has no interest in the government of pilots or their boats, except so far as it is conducive to the public good. Any rule or set of rules which shall have any other purpose than this, even though they be made for the benefit of some of the pilots themselves, unless expressly authorized by the provisions of the act, are without its scope, and void.

Now, in the present case, it has not been shown how the installment of John B. Merritt upon the pilot boat Thomas Howard will inure to the public good. It is stated in the bill, and admitted by the demurrer, that the Thomas Howard was at that very time well and efficiently manned and equipped. She was prepared and competent to act her part in the discharge of this pilotage service so important to the public at large. If the placing of Merritt upon the Howard would have in any way improved the service, then that fact should have been presented by the respondent. This, however, has not been done, and I have no facts before me which can by any possibility lead me to such a conclusion.

The action of the board, then, not having been shown to have been inspired in the interest of the public generally, must rest its authority, if at all, upon some express and positive provision of the act. Such a provision, however, I have not been able to find. The clause authorizing the board to make rules for the government of pilots while in this service, having for its

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sole purpose, as has just been shown, the conservation of the public interest alone.

As to the second question, the answer must be in the negative. Under the clause authorizing the Board of Pilot Commissioners "to make rules for the government of pilots," etc., the orderly course of procedure would have been to make general rules in pursuance of this power. In this case, however, the board assigned John B. Merritt to the boat Thomas Howard before making any rule upon the subject. This action of the board partook more of the nature of an order than of a rule. These words "rule" and "order," when used in a statute, have a definite signification. They are different in their nature and extent. A rule, to be valid, must be general in its scope and undiscriminating in its application; an order is specific and limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made. Now the mode adopted by the board to place Merritt upon the Howard was really an order and not a rule, because it applied and was directed to only one particular boat and its owners. This proceeding of the board then, not being in strict compliance with the provisions of the statute which created it, is irregular and, therefore, void.

I do not wish, however, to be understood as questioning the power of this board, within the limitations of the act, and to the extent of the public interest, to control the conduct of the pilots in the pursuit of their vocations. Such power it certainly has, but it must be exercised by the formulation of rules and not by orders alone.

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I have reserved the question of jurisdiction for the last, because, while it was asserted that this court has not jurisdiction of the cause, yet it was not seriously contended for. The jurisdiction of the court in this case may be rested upon the fact that the declared intention of the board to revoke complainants' licenses was virtually a declaration of a proposed forfeiture of their licenses, which, under any view of the case presented, as has just been shown, is not authorized by the act. An absolute or indefinite revocation of the licenses is equivalent to a forfeiture, and the action of the board must be so construed. While the general doctrine is that equity may relieve against forfeitures declared by contract, but not against those expressly declared or authorized by statute, yet when they are not so declared or authorized, equity will relieve by the interposition of its injunctive power.

Syllabus.

FLORENCE HILL FROST v. SAMUEL W. McCAULLEY and J. AUGUSTUS McCAULLEY, Trustees under the Last Will and Testament of WILLIAM McCAULLEY, Deceased.

New Castle, September Term, 1894.

Wills — construction of; Legacies — vested or contingent; Gift — enjoyment of, postponed by the will.

1. When no time is fixed by the testator for the division of the estate directed in the will, it becomes the duty of the court to fix such a time as will best aid in carrying into effect the uses, intents and purposes for which the trust created in the will was established.
2. The testator, by will, gave his executors power to encumber his estate at their discretion, and then to sell it and divide the proceeds into eleven shares. As to the last of these shares, he provided as follows: "The income of one other, and the last of said shares or parts, I give to F. H. F., payable half yearly for ten years, after which time I give the same to her absolutely." In another part of the will, he provided that: "And I hereby authorize my executors and trustees, at their discretion, to pay to any of my children who may need it, such sums from time to time, before the estate is settled, as they may deem needful and proper; the same to be accounted for as part of the income of their shares in my estate respectively." Held,
 - a. That the gift to F. H. F. was an absolute vested legacy, but that it would have been otherwise had it been a gift of the principal, without the gift of the income during the interval between the death of the testator and the expiration of ten years thereafter.
 - b. That the ten years is to be calculated from the date of the death of the testator and not from the date of the settlement by the executors.

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BILL IN EQUITY.—Bill filed by Florence Hill Frost, legatee under the last will and testament of William McCaulley, deceased, for construction of certain portions of said will of said deceased.

H. H. Ward, for complainant.

An examination of the will of William McCaulley discloses the following special features:

1. That the only power of sale of any portion of the estate of the decedent, is "to the end" that his executors and trustees may pay his debts, funeral expenses and necessary expenses of settling his estate, "as soon as conveniently may be," after his decease.

2. That the executors and trustees are given power at their discretion to pay to any of the children of the decedent who may need it, such sum, from time to time, before the estate is settled, out of the income granted them, as the executors and administrators may deem needful and proper. The testator, by this provision, expressly indicates the character of the bequests made to the beneficiaries under his will, as that of *quasi* annuities, payable from the death of the testator. He has thereby plainly indicated an intent that these bequests of income upon the shares of his residuary estate granted to the several legatees, should begin to run with his death and not be delayed until the end of the year.

3. The devise and bequest to the trustees is not the proceeds of such sales or the net valuation of his estate, but is expressly "all my real, personal and mixed estate, of whatever kind or nature, wheresoever situate or being in the State of Delaware or elsewhere," so that

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the attaching of the trusts and the performance of the special duties assigned to the trustees by the will, is not delayed until the settlement of the estate, or until the determination of the exact amount of the residuary estate, or the fixing of any definite sum arising from the division afterwards in the will provided.

4. The devise and bequest to the trustees is declared to be "in trust, nevertheless, for the uses, intents and purposes above and within mentioned."

The purposes "above mentioned," are the payment of the debts, funeral expenses and expenses of settling the estate, the sale of any portion of his estate that the executors and trustees should think advisable, the renting and management of the estate for the best advantage in every respect, as the testator might do if living; and to pay to any of his children such portion of their income before the settlement of the estate, as the trustees should deem needful and proper.

The uses, intents and purposes "within mentioned," are the power and authority to create liens pending the sale of the estate, the apportionment of the estate into eleven equal shares, the payment of the income upon each and every of these eleven shares to the legatees mentioned, the investment of the residue of his estate in securities mentioned, and the payment of certain specific legacies in the will enumerated.

All of these powers and duties are, so far as the will indicates, to be done and performed simultaneously and from the death of the testator.

5. The apportionment of the estate into eleven equal shares by the executors and trustees is, so far as any intention is indicated by the testator, to take place im-

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mediately on the death of the testator, and at least for the purposes of payment of income. In the practical administration of the estate, it was probably convenient for the trustees to make a definite division of the estate after payment of debts and expenses, and the specific funding of each separate share may have been delayed until such settlement of the estate; but, under the terms of the will, the payment of the annuities, or *quasi* annuities, arising from these shares or parts of the estate, allotted to the different legatees, is clearly intended by the testator to be from the date of the death of the testator. Under no single decision or rule of law could any other intent be construed into the will with reference to the shares given to Sybilla McCaulley, Samuel Sinclair McCaulley and Mary Sinclair Jefferis and Elizabeth W. Combe, since there is a devise over of the principal. Every authority is clear upon this point. The wording of the bequests of the income of the remaining one-tenth share of the estate of the testator, is precisely the same and affords no ground for distinction between the other ten shares and the share willed to the complainant. The only possible distinction between the other ten shares and the remaining one-eleventh share willed to Florence Hill Frost, the complainant in this bill, is that she is constituted the final and full beneficiary of the share itself as well as the income of said share. The identical wording, however, of the grant of the income of the whole eleven shares, including that to the complainant, points to an identical intent on the part of the testator that the income upon each of the ten shares should be paid to the beneficiaries of those shares from the death of the testator. This

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intent is fully supported by the manner in which the whole estate is immediately vested in the trustees, and by the powers granted them, which are above referred to. 3 Jarman on Wills (5th Am. ed.), 707, rule 18, 708-722.

6. It should also be noted that the division of this estate and the separation of the different shares is not postponed to any special future day, but, under the terms of the will, is to be made at once.

The question raised by the item of the will, in which the one-eleventh share in controversy is given to the complainant, and which is the only question now before the court in the construction of this will, is whether the time has now arrived when the complainant can demand payment of the principal of the fund which represents her one-eleventh interest in the estate.

This "item" reads as follows: "The income of one other, and the last of said shares or parts, I give to my granddaughter Florence Hill Frost, daughter of my son William S. McCauley, deceased, payable half-yearly, for ten years, after which time, I give the same to her absolutely."

No authority need be cited for the point that, with reference to such a disposition of a testator's general estate after his decease, as is expressed in the item of this will under consideration, the will speaks from the death of the testator.

The natural reading of the "item" in question is that "after which time" (the ten years mentioned immediately preceding) "I give the same" (meaning the last of said shares or parts) "to her" (Florence Hill Frost) "absolutely."

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This, the natural and almost unavoidable sense of this "item" in this particular, will under the rules for construction of wills, and the ascertainment of the intent of the testator, be adopted by the court, unless there is something else in the will clearly showing a different intention on the part of the testator. 3 Jarman on Wills (5th Am. ed.), 107, rule 16.

The only other possible construction of the words of this section would be that the possession of the principal of the fund is postponed until the income of the fund has been actually paid to the complainant for ten years, which reading, in case the will should be construed as not directing the payment of the income from the death of the testator, would apparently postpone the payment of the principal of the fund until after the tenth annual payment of income, and would make the intent of the testator depend upon the actual administration of his estate after his death, and the date of the first payment of income by the trustees to the complainant. But events occurring subsequent to the death of the testator are clearly incompetent evidences of the intent of the testator, which intent, upon such a point as this, must be gathered from the terms of the will itself.

The intent of the testator, that the income upon the share given to the complainant should begin to run with the death of the testator, clearly appears upon the face of the will, as above shown.

But, upon a fair reading of this will, the income of this share, payable half-yearly, is in legal effect an annuity. Redfield on Wills (Part II), 168, chap. 5,

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§ 10, par. 25; Sullivan et ux. v. Winthrop et al. (Story, J.), 1 Sumn. 11, 12.

An annuity given by will commences immediately from the testator's death, and payments are recoverable from his death. 2 Williams on Executors, 1491; Redfield on Wills (Part II), 171, chap. 5, § 26, par. 13; Houghton v. Franklin, 1 Sim. & Stu. 392; Sargent v. Sargent, 103 Mass. 297; Hilyards' Estate, 5 W. & S. (Penn.) 30; Eyre v. Golding, 5 Binn. 472; Sullivan et ux. v. Winthrop et al. (Story, J.), 1 Sumn. 11, 12.

So far as the construction of this will is concerned, the methods pursued by the executors and trustees in the settlement of the estate, have no application or force. If the intention of the testator can be either gathered from the face of the will or be construed into said will by the application of legal principles that the income was payable upon the share of the complainant from the death of the testator, the construction of the item in question, even upon the second alternative reading above suggested, would entitle this complainant to the payment at this time of the principal of the share of the estate now in controversy.

If the principal of his legacy is now due, it is payable immediately to this complainant, upon the principle, that the year's time which an executor has to pay a legacy, must be intended as from the death of the testator, and not of legacies falling due at a period after the first year following the testator's death is over; in such case, the executor or trustee is entitled to no delay. 2 Williams on Executors, 1489; Redfield on Wills (Part II), 565, chap. 13, § 59, par. 2; Laundry v.

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Williams, 2 P. Wms. 478; Miller v. Philip, 5 Paige, 573.

But, by a course of reasoning, wholly independent of the foregoing, the same conclusion may be reached that under the rules of law, as clearly laid down, the complainant is entitled to the immediate payment of the principal of the share in controversy.

It sufficiently appears upon the face of the bill and of the will of William McCauley, that the complainant, Florence Hill Frost, is now twenty-one years of age and upwards. The face of the will itself shows that she was a married woman, having changed her name from Florence Hill McCauley to Florence Hill Frost before the date of the execution of the will. The will was executed on the 12th day of March, A. D. 1880, about fourteen years ago. So that, unless the complainant was married before the age of seven years, she must now be twenty-one years of age and upwards.

This legacy is vested in interest; for (as exception to the general rule) it is laid down, that where a testator bequeaths a legacy to a person at a future time, and gives the legatee the intermediate income or interest, the court then considers the disposition of the income or interest to be an indication of the testator's intention that the legatee should, at all events, have the principal, and on this ground, holds such legacy to be vested. 2 Williams on Executors, 1335-1336; Redfield on Wills (Part II), chap. 14, § 64, pars. 30, 31, 33 and 35; 2 Jarman on Wills (5th Am. ed), 459, 460, 461, etc.; Fearne on Contingent Remainders, 553, note by Mr. Butler; Hanson v. Graham, 6 Ves. 239; Saunders v. Vautier, 1 Cr. & Ph. 248; Hoath v. Hoath, 2 Bro. C. C. 4; Parker

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v. Golding, 13 Sim. 418; Lister v. Bradley, 1 Hare, 10-13; In re Hart's Trust, 3 DeG. & J. 195; Fox v. Fox, 19 L. R. Eq. Cas. 286; Roberts' Appeal, 59 Penn. St. 70; Eldridge v. Eldrige, 9 Cush. 516; Burrill v. Sheil, 2 Barb. 457, 470, etc.; Vanwick v. Bloodgood, 1 Bradf. Sur. 154; Vawdry v. Geddis, 1 Russ. & My. 207; Jones v. Mackilwain, 1 Russ. 220; Murray v. Addenbrook, 4 Russ. 407, 418-419; Murkin v. Philipson, 3 Myl. & K. 257; Pearson v. Dolman, 3 L. R. Eq. Cas. 315; Cave v. Cave, 2 Vern. 508; Stapleton v. Cheele, id. 673; Collins v. Metcalf, 1 id. 462; Wolcott v. Hall, 2 Bro. C. C. 305; Dodson v. Hay, 3 id. 404, 409, 410; In re Peek's Trusts, L. R., 16 Eq. Cas. 221; Stevenson v. Lesley, 70 N. Y. 512; Peterson's Appeal, 88 Penn. St. 397.

The phrase "after which time" is apparently intended only to postpone the time upon which the principal of the legacy would be payable to the complainant. But, even if construed as a phrase importing a condition, it would not interfere with the above rule of law. 2 Jarman on Wills (5th Am. ed.), 459-460, and the cases cited under the preceding point.

Where the testator gives a legatee an absolute vested interest in a defined fund, so that according to the ordinary rule he would be entitled to receive it on attaining twenty-one years of age, but by the terms of the will, payment is postponed to a subsequent period, the court will, nevertheless, order payment upon the legatees attaining the age of twenty-one. 2 Williams on Executors, 1505; Saunders v. Vautier, 4 Beav. 115; 1 Cr. & Ph. 240; Joselyn v. Joselyn, 9 Simm. 63; Merritt v. Richardson, 14 Allen, 239, 241, 242; Curtis v. Lukin, 5 Beav. 147, 155, 156; Greet v. Greet, id.

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123; In re Jacobs' Will, 29 id. 402; In re Young's Settlement, 18 id. 199; Rocke v. Rocke, 9 id. 66; Re Culson's Trusts, Kay, 133-141; Coventry v. Coventry, 2 Dr. & Sm. 470.

Bradford & Vandegrift, for respondents.

WOLCOTT, CHANCELLOR.— This case was heard on bill and answer. The latter admits all the allegations of fact contained in the former, but practically denies the legal effect thereof.

William McCaulley, late of the City of Wilmington, in his lifetime, made his last will and testament, bearing date the 12th day of March, A. D. 1880, in which he gave and devised his property to the persons therein named in the shares and proportions, as shown in the following items of said will:

“ First. It is my will that my just debts and plain and moderate funeral expenses, and the necessary expenses of settling my estate, be first paid as soon as conveniently may be, after my decease, and to that end I authorize and empower my executors and trustees, hereinafter named, to sell and convey to the purchasers in fee-simple, or otherwise, all or any part of my estate for cash or upon credit, or part cash and part credit, at public or private sale, in small or large lots in all things at their discretion, as they may deem best for the advantage of my estate, and out of the net proceeds of such sale, and from collections to pay off all my debts, and to rent and manage my estate so as to have the same settled in a fair and reasonable time after my decease; and to manage the said estate for the best advan-

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tage in every respect, as I might or could do if living. And I hereby authorize my executors and trustees, at their discretion, to pay to any of my children who may need it, such sums from time to time before the estate is settled, as they may deem needful and proper; the same to be accounted for as part of the income of their shares in my estate, respectively.

"Second. I give, devise and bequeath unto my two nephews, Samuel W. McCaulley and John Augustus McCaulley, and the survivor of them, all my real, personal and mixed estate of whatever kind or nature, or wheresoever situate or being in the State of Delaware, or elsewhere; to them, their heirs, executors, administrator and assigns; in trust, nevertheless, for the uses, intents and purposes above and within mentioned; and especially with power and authority to create liens on any part of my estate by note, judgment and mortgage, or otherwise, until my estate can safely be sold at their discretion. And to apportion my estate into eleven equal shares or parts to be distributed as follows, to-wit:

"The income of one of which shares or parts, I give to my beloved wife, Sibilla McCaulley, to be paid to her half-yearly, for and during her natural life, to be deemed and taken in lieu and bar of dower in my estate. I make this provision for the love and affection I bear her, she having her own estate, which is ample, and there being a marriage contract between us, authorizing each party to have and manage his or her estate, without the claim or interference of the other, and in bar of dower, said marriage contract being in the hands of one Waddell, of Trenton, New Jersey, and after the decease of my said wife, I order the same principal and

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income paid to my granddaughter, Florence Hill Frost, absolutely, her heirs and assigns.

"The income of one other of said shares or parts, I give to my son Samuel Sinclair McCaulley, to be used and expended for his use and benefit by my executors and trustees, and the survivor of them, for and during his natural life, at such times and in such manner as they may deem for his advantage, and after his decease, and after paying for his necessary expenses in last sickness and funeral expenses I give said share or part unto his sisters and nephews and nieces, share and share alike, absolutely.

"The income of four other of said shares or parts, I give unto my daughter Mary Sinclair Jefferis and her two sons and my grandsons, William McCaulley Jefferis and Joseph Herbert Jefferis, half-yearly, she to receive two shares and they one share each, until the decease of their mother, when each son shall have two shares absolutely.

"The income of four other of said shares or parts, I unto my daughter, Elizabeth W. Coombe, and her two daughters and my granddaughters Kate Halloway and Elizabeth Coombe, Jr., payable half-yearly, the mother to receive two shares and each of her daughters one share, until the decease of the mother, when each daughter shall have two shares absolutely.

"The income of one other, and the last of said shares or parts, I give to my granddaughter Florence Hill Frost, daughter of my son William S. McCaulley, deceased, payable half-yearly, for ten years, after which time I give the same to her absolutely."

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The testator departed this life on or about the 22d day of September, A. D. 1883, leaving said will unrevoked, which was duly admitted to probate by the Register of Wills in and for New Castle County, and on the 27th day of September of the same year letters testamentary were, in due form of law, granted to Samuel W. McCaulley and John Augustus McCaulley, the executors named in said last will and testament. The executors, in the course of the administration of the testator's estate, on the 4th day of April, A. D. 1889, passed a third and last account, wherein they showed a balance due the estate of \$58,382.95. Of this sum it is admitted that Samuel W. McCaulley and John Augustus McCaulley, who had assumed the character of trustees, under the direction contained in the said will, held \$5,287.36 in trust for the complainant, Florence Hill Frost.

The complainant's share of the estate of the testator is the one-eleventh part. The provision of the will under which she takes reads as follows:

"The income of one other and the last of said shares or parts, I give to my granddaughter Florence Hill Frost, daughter of my son William S. McCaulley, deceased, payable half-yearly, for ten years, after which time I give the same to her absolutely." The question raised by this provision of the will is whether the principal of the fund, which represents the complainant's interest in the estate of the testator, became payable at the expiration of ten years from the day of the death of the testator; that is to say, on the 23d day of September, A. D. 1893.

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It is admitted that the complainant at that time was over twenty-one years of age, and, therefore, competent to receive her legacy and execute an acquittance for the same, unless there was annexed to the substance or the payment thereof a condition which forbids the complainant's right of immediate possession thereto. Was there such a condition?

The first step in the determination of this question is to ascertain the time when the division of the estate, as directed by the will, was to take place. As no definite time was fixed by the testator, it becomes the duty of the court to fix such time as will best aid in carrying into effect the uses, intents and purposes for which the trust created in the second item of said will was established. By conferring on his executors and trustees the power to pay to any of his children such sum or sums of money, from time to time, before the estate was settled, as any of them might need, and such payments to be treated as part of the income of their respective shares, the testator clearly indicated that the division of the estate should be made or be considered as made before the final adjustment or settlement of the same. It must be observed that the payments to the children of the testator were to be made out of the income produced by their respective shares. How could the executors and trustees make such payments while the estate remained in bulk or undivided according to the scheme of division as presented in the will? He nowhere in his will provided for the investment of his whole estate and the distribution of the interest annually accruing thereon among those whom he had designated as the objects of his bounty. But he did ex-

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pressly provide for the investment of each share and the disposition of the income arising therefrom, thus making the income to be derived from the shares of some of the legatees the only source whence they could derive any benefit from the testator's generosity. Though the estate has now been actually apportioned or separated into shares as directed by the will, yet, for the purposes of the will, it must be treated as so separated from the death of the testator. To concede that the time for the division of the estate would be immediate after the final settlement thereof would make the enjoyment of each gift contingent upon the sloth or diligence of the executors, and might result in partial or total defeat of the intention of the testator, as to one or all of his beneficiaries, especially those whose interests are coexistent and coterminous with their lives. There is, therefore, not a shadow of reason for imputing such an intention to the testator. Though the estate has never been actually apportioned or separated into shares, as directed by the will, yet for the purposes of the will it must *ex necessitate rei* be treated as so separated from the death of the testator. What in equity ought to be done is considered as done.

Having ascertained the time when the division of the estate took place, we must next inquire whether the share of the complainant is a vested or a contingent legacy. The provision of the will, by which the testator gave to the complainant one-eleventh part of the estate in the first place, gives to her the income, payable semi-annually, for ten years, and after that time gives to her "the same;" that is, the principal, absolutely. The gift to her of the principal, without the gift of the

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income, during the interval between the death of the testator and the expiration of ten years thereafter, would have made her share a contingent legacy, but the appropriation of the accruing interest during that interval for her benefit makes the gift, in substance, an absolute vested legacy, divided into two distinct portions or interests, for the purpose of postponing not the vesting but the possession only. 1 Jarman on Wills, 843 (5th ed. Bigelow).

It is, therefore, a vested legacy, payable immediately after the expiration of ten years from the testator's death with all the unpaid interest thereon.

Syllabus.

EDWARD BRINGHURST, Jr., Executor of the Last Will
and Testament of HANNAH SHIPLEY, Deceased, v.
ELIZABETH B. ORTH et al.

New Castle, September Term, 1894.

**Wills — codicils — construction of; Wills — revocation by
codicil; Construction of the words "heirs-at-law" and
"issue" in a will.**

1. In order that a codicil shall operate as a revocation of any part of a will, in the absence of express words to that effect, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention. They are both supposed to be made and executed with the same solemnity and deliberation, and, therefore, both are entitled to the same degree of consideration. The will and the codicil constitute part of the same testament, and they are each, in legal estimation, equally sacred and inviolate. Any part of the one, not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language.
2. In the construction of a will with a codicil annexed, any part of the one, not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language.
3. The term "issue," used in a codicil, and the term "heirs-at-law," used in a will, when employed to denote the beneficiaries and not to limit the quantity or duration of an estate in lands, are not, of necessity, so contradictory as to lead to a revocation of the provision of the will.

Syllabus — Statement — Argument for defendant.

4. In one of the items of her will, the testatrix provided that "if any of the devisees or legatees in this my will named, shall die before me, then the said devises and legacies shall not lapse, but shall pass and go to such person and persons as would be the heirs-at-law of such devisee or legatee under the intestate laws of the State of Delaware." In the codicil to said will, it was provided that, "in case of the death before my death of any of the legatees or devisees named in my will, the shares of those dying before me, to go to their issue, the said issue to take the share of their deceased parent, except as to any share which would go to S. D. P.," etc. Held, that the codicil did not revoke the quoted provision of the will, and that the shares of certain legatees dying before the testatrix without issue, did not lapse.

BILL OF INTERPLEADER and for instructions to executor and construction of will. The facts are stated in the opinion of the Chancellor.

George Gray and Herbert H. Ward, for Elizabeth B. Orth, Elizabeth B. Orth, executrix of Olivia F. Dixon, deceased, and Elizabeth B. Orth, surviving executrix of Anna Shipley Dixon, deceased.

The provisions of the will of Hannah Shipley, deceased, which are set forth in the bill of interpleader as apparently inconsistent, and as creating the necessity for this court to construe the same, are as follows:

(1) "Provided, always, and I do hereby direct that if any of the devisees or legatees in this my will named shall die before me, then the said devises and legacies shall not lapse, but shall pass and go to such person and

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persons as would be the heirs-at-law of such devisee or legatee under the intestate laws of the State of Delaware." This provision appears in the body of the original will, dated 16th of June, 1873.

(2) "Second. In case of the death before my death of any of the legatees or devisees named in my will, the share of those dying before me to go to their issue, the said issue to take the share of their deceased parent, except as to any share which would go to Samuel D. Paschall, as to which, I devise as follows, to-wit: " etc. This provision appears in the second codicil, dated 28th of November, 1885.

Considering these passages of the will, it may be observed:

(1) That the testatrix has in the plainest and most positive terms "directed" that no lapse shall take place under the state of facts set forth in the bill of interpleader and the answers thereto. Her intent in this particular is wholly unmistakable. In no other part of the will is any contrary intention to any degree whatsoever indicated. The very passage which is cited as inconsistent with the one containing this provision against lapse shows, so far as it goes, the same anxious care to prevent intestacy in any part of her estate, and to provide against the possibility of a lapse of any legacy.

Where a will contains a provision against lapse, the will must be so construed as to avoid a lapse if the testatrix has provided proper substitutes to take in lieu of the original legatees. Williams on Executors, *1207, *1210; Sibley v. Cook, 3 Atk. 572; Bridge v. Abbott, 3 Bro. C. C. *224; Rivenett v. Bourguin, 53 Mich. 10; Appeal of Trustees of University, 97 Penn. St. 187-200.

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There can be no contention but that the testatrix has clearly provided proper substitutes to take in lieu of the original legatees; and this contention arises principally over who those substitutes are.

(2) There exists no positive inconsistency between the passage quoted from the original will and that quoted from the second codicil. Inasmuch as "issue" of a "parent" are the heirs-at-law, where there are any issue, the provision from the codicil covers one class of the persons who should be included within the words "heirs-at-law," used in the provision from the original will. The provision from the second codicil is clearly consistent with that from the original will, because that codicil apparently designates a class of persons to take as substitutes of the original legatees which differs only in range, but not in kind, from the class of persons designated in the original will, both classes being heirs-at-law of such deceased legatees; in other words, the same and not a different class of persons, in quality, is referred to in both provisions.

A codicil is part of the will to which it is attached or refers, and it and the original will must be taken and construed as one testament. Williams on Executors, *8, etc., and note G (Perkins' ed.); Collier v. Collier, 3 Ohio St. 369, 373; Negly v. Gard, 20 id. 310; Neff's Appeal, 48 Penn. St. 501, 507, 509; Doe d. York v. Walker, 12 M. & W. 591, 600, 601; Boyle et al. v. Parker, 3 Md. Ch. 42; Willett v. Sandford, 1 Ves. 186; Westcott v. Cady, 5 Johns. Ch. 343; Beable v. Dodd, 1 T. R. 193, 202, 203, 204.

In interpreting a will and codicil, the general rule is that the whole will takes effect so far as it is not in-

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consistent with the codicil; and the provisions of the latter are to be so construed, if it can fairly be done, as to make it harmonize with the body of the will. It is the established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil. 1 Jarman on Wills, 342-349 (Bigelow, 5th ed.); Norman v. Kynaston, 3 DeG., F. & J. 29; Wetmore v. Parker et al., 52 N. Y. 450, 461, 462, 465; Cleobury v. Beckett, 14 Beav. 583; Murch v. Marchant, 6 Man. & Gr. 813, 825; In re Arrowsmith's Trustees, 2 DeG., F. & J. 474, 479; Molyneux v. Rowe, 8 DeG., M. & G. 368, 375; Evers v. Ward, 18 Q. B. 197, 221, 223; Quincy, Executor, v. Rogers et al., 9 Cush. 291, 295, etc.; Homer v. Brown, 16 How. 354, 368; In re Howard, L. R., 1 Prob. & Div. 636; Agnew v. Pope, 1 DeG., M. & G. 49; Roach v. Haynes, 6 Ves. Jr. 153, 156; Nelson v. McGiffert, 3 Barb. 164; Boyle et al. v. Parker, 3 Md. Ch. 42, etc.; Pue v. Pue, 1 id. 382, 385; Butler v. Greenwood, 22 Beav. 303; Pilsworth v. Mosse, 14 Ir. Ch. 163, 173, 175, 177, etc.

As a general rule, a codicil will not be held to be inconsistent beyond the clear import of its language; and where a provision in the original will is clear, it is incumbent upon those who contend that it is not to take effect by reason of an alleged revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention expressed in the body of the will. 1 Jarman on Wills, 349; 1 Williams on Executors, 220 and note, *185; Doe d. Hearle v. Hicks, 8 Bing. 479, 484, 489; Williams v. Evans, 1 El. & Bl. 727, 739; Robertson v. Powell, 2

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Hurl. & Colt. 762; Murch v. Merchant, 6 M. & G. 813, 825; Wetmore v. Parker et al., 52 N. Y. 450, 451, 462, 465; Quincy, Executor, v. Rogers et al., 9 Cush. 291, 295, etc.; Cleobury v. Beckett, 14 Beav. 583; Pillsworth v. Mosse, 14 Ir. Ch. 163, 173, 175, 177, etc.

The general intent of the testatrix that there shall be no intestacy in any part of her estate, and that there shall not be a lapse in case of the death of any legatee before her, is too evident for contrary argument. The opposite construction of this will from that contended for by Mrs. Orth would produce an intestacy and such a lapse. But where in a will there is a manifest general intent, the construction of the will should be such as to effectuate such general intent, and this is the rule, even though by that construction some particular intent may be defeated *Allyn v. Mather*, 9 Conn. 114, 127; *Cordry v. Adams*, 1 Harr. (Del.) 439, 441; *Bernard's Lessee v. Bailey & Kettlewood*, 2 Harr. 56, 65; *Rodney v. Burton*, 4 id. 183, 186; *Robinson v. Robinson*, 1 Burr. 38, 50, etc.; *Pue v. Pue*, 1 Md. Ch. 382, 387.

But it should be noted that the particular intent in this second codicil, that the issue of a deceased legatee should take in lieu of such deceased legatee, would not be defeated by leaving the particular provision in the body of the will in question in full force; but, on the other hand, even such particular intent would be fully effected and insured.

It is a settled rule of construction where a testator has manifested an intent to dispose of his whole estate by his last will, that a testator is never presumed to intend to die intestate as to any part of his estate, to which his attention seems to have been directed, and

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a court of equity will put such a construction upon equivocal words as to prevent such a result. *Collier v. Collier*, 3 Ohio St. 369, 374; *Meberly v. Strode*, 3 Ves. 450, 455; *Booth v. Booth*, 4 id. 403, 407; *Bosley v. Bosley*, 14 How. 398, 399; *In re Colshead's Will*, 2 DeG. & J. 689, 692.

(3) But a critical examination of the second codicil will show that it contains no evidence of an intent on the part of the testatrix to revoke generally the explicitly and fully-expressed provisions as to lapsing and as to substitution of persons to take in lieu of deceased legatees, which appear in the body of the will.

A reference to section 6 of the bill of interpleader discloses the fact that Mary Anna Paschall, the legatee of one equal seventh share of testatrix's residuary estate, "predeceased the said testatrix, and left to survive her Samuel D. Paschall," and others, being her children and heirs-at-law. The whole of the second codicil bears internal evidence of having been inspired by this fact, and relates exclusively, with the exception of the third item, to Samuel D. Paschall, and his relations to the testatrix's estate.

All the directing and positive provisions of the second item of this codicil, which item contains the provision which is alleged to be inconsistent with the provision against lapsing in the body of the will, relate wholly to the share which "would go to Samuel D. Paschall," upon the decease of his mother. The phrase in this item referring to the substitution of persons to take in lieu of legatees who should die before the testatrix, does not constitute a grammatical sentence, it is a recital only of the former provision of the

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will relating to the same subject-matter, and is merely introductory to, and explanatory of, the main object of the item, which is to provide in an especial and exceptional manner for the said Samuel D. Paschall and his share in the estate. It amounts to the same thing as if the testatrix had said: "It is my general intention, as I have heretofore provided, that in case of the death before my death of any of the legatees or devisees named in my will, who shall leave children, as Mary Anna Paschall has done, that the share of such decedents before me, shall go to their children, but in the case of Samuel D. Paschall, son of Mary Anna Paschall, I devise as to his share, which he shall so obtain in lieu of his mother, as follows:" Whereupon the testatrix places the share of the said Samuel D. Paschall in trust, freed from the claims of any creditors he may at any time have, and limits the principal over to his children.

The sole apparent object and intent of this item in question in the second codicil is to protect Samuel D. Paschall and his share of testatrix's estate, in the particular and special manner therein set forth. Everything else in the item is only incidental and explanatory. There is certainly no expressed intent to modify the general provisions in the body of the will relating to all the legatees.

An expressed intention to make an alteration in a will in one particular negatives by implication an intention to alter it in any other respect. *Wetmore v. Parker et al.*, 52 N. Y. 467; *Quincy, Exr., v. Rogers et al.*, 9 Oush. 291, 296.

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Moreover, it is worthy of special note that the testatrix has manifested special care in this second codicil to guard against any implied or constructive revocation of any provisions of her will; this anxiety is shown by the fact that at the beginning of this codicil she says: "First. I ratify and confirm my said will, except so far as the same may be altered by this and the former codicil," and has closed the codicil by directing, "and lastly, I do ratify and confirm my said will and codicil, except so far as the same may be altered by this codicil." No other codicil has more than one similar clause.

(4) There is no doubt but that it is a rule for the construction of wills that if a legacy be left in common as distinguished from joint tenancy, to two or more named persons constituting a class, and one or more of such class predecease the testatrix, the share or shares of such deceased legatee or legatees will lapse. But this rule is only a rule of construction and yields to a contrary intent of the testatrix indicated by the will; as, for instance, an intent that there shall be no lapse, or an intent to dispose of the whole estate and save an intestacy in any part.

The facts, therefore, that the testatrix mentions by name "the children of my nephew Joseph Dixon, deceased," and that she gives a certain part of the residue of her estate to such named children "in equal parts," are not conclusive; and if the intention to give a right of survivorship is collected from the will as a whole, applied to the existing admitted facts, such intention must prevail. *Stedham v. Priest*, 103 Mass. 296; *Jackson v. Roberts*, 14 Gray, 551; *Schaffer v. Kettell*, 14 Allen, 528, 530, 531.

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(5) But in the construction of a will, the court is at liberty, and in cases of any doubt, is bound, to look at the whole will and may in any part thereof, including codicils, look for evidence of the testatrix's intent in any particular. *Quincy, Exr., v. Rogers et al.*, 9 Cush. 291, 295; *Allyn v. Mather*, 9 Conn. 114, 125, 126; *Doughten v. Vandever*, 5 Del. Ch. 66; *Brounfield v. Wilson*, 78 Ill. 467, 469, etc.; *Sawyer v. Baldwin*, 37 Mass. 378, 384, etc.

According to the principle last above stated, the court may note (1) the general intent of the testatrix manifested in the whole will, and negatived by no portion thereof to prevent a lapse in case of the death of any legatee before her; (2) the nomination by the testatrix in the body of her will, of a general class of persons, as substitutes to take in lieu of legatees deceased before her, and that the testatrix has not elsewhere named any person, or class of persons, not included in such general class of such substitutes, to so take in lieu of such predeceased legatees; (3) the fact that under the facts admitted of record by all parties to these proceedings and under the construction of the will opposite to that herein argued for by Mrs. Orth, the general intent of the testatrix to prevent a lapse would be nullified; (4) the fact that the testatrix has in all instances where she has intended to revoke former bequests expressed herself in her codicils explicitly, positively and unmistakably; as, for instance, in the third codicil, when she says: "Whereas, in my will, I have devised to the City of Wilmington, under the name of 'The Mayor and Council of Wilmington,' five thousand (\$5,000) dollars in trust for the worthy poor of Wilmington. Now,

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I revoke the said bequest." And again in the fourth codicil, when, after reciting a bequest theretofore made to Robert Salisbury, she says: "Now, therefore, I do hereby revoke the said legacy so bequeathed," which provisions plainly indicate her appreciation of the necessity and propriety of positive averments in such cases; (5) that, as appears by the admitted facts stated in the bill of interpleader, the fund affected by the construction of the will prayed for by the executor, is more than twice and a half as large as all the bequests which she has thus, in unmistakable terms, revoked; (6) and that the testatrix has, in the last codicil to her will, executed so late as the 10th of October, 1890, herself construed her will in perfect accordance with her intent and meaning, as contended for by Mrs. Orth, and in the following words: "Whereas, in my will, I have bequeathed to Robert Salisbury a legacy of five thousand dollars, and by further general provisions of my will and the codicil thereto, said legacy would be payable to his issue or legal representatives, and, whereas, his daughter is now dead; now, therefore, I do hereby revoke the said legacy so bequeathed." In these, the latest words of the testatrix, is further plainly expressed the testatrix's intent, under all the provisions of her whole will, that in no event should a legacy lapse by reason of the death before her of any legatee named, and that in the event of any legatee dying before her without issue, the same should be payable to such predeceased legatee's next of kin, who would be "under the intestate laws of the State of Delaware, the heirs-at-law of such devisee or legatee."

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If the expressions of, and the reasons for making, this provision in the codicil of 1890, it being the fourth codicil, be examined, it will be noted that it could have been made necessary only upon the death of Robert Salisbury, and that the fact of his death is clearly implied therein; that his issue, to-wit, his daughter, being dead, the testatrix believed that, according to her intentions expressed in her will and codicils, the legacy of \$5,000 given to Robert Salisbury would be payable to his "legal representatives;" that in such a connection "legal representatives" means next of kin (see authorities cited later in this argument), which would be with reference to personalty, "such person or persons as would be the heirs-at-law of such devisee or legatee, under the intestate laws of the State of Delaware;" and that it was to prevent such operation in her will in his particular case that made, in the testatrix's opinion, this provision in her codicil a necessity.

Construing the pertinent provisions of the will, the second codicil and the fourth codicil together, they are all consistent with the testatrix's intention, as expressed in the body of the will, that in case of the death of any of the legatees before her, the heirs-at-law of such legatee should, to prevent a lapse of any bequest, be substituted in lieu of such deceased legatee; and that in case of such decease of such legatee leaving issue, that such issue, being also heirs-at-law of such deceased legatee, should take the bequest given to such deceased legatee. Such a construction of the whole will leaves every provision thereof intact and in full force. The contrary construction necessitates the utter rejection of the provision against lapse and for substitution in the

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body of the will, and the disregarding of the evidences of intention appearing in the subsequent and latest codicil.

(6) But if it shall be contended that the latest provision of a will or a codicil must govern the construction of the will in any particular, where such later expression of the testator's meaning introduces a new factor or varies the terms used in reference to the same subject-matter earlier in the will, we must come down to the fourth codicil for the latest form of expression of the testator's intent with reference to lapse and substitution.

In this last codicil, in the above-mentioned provision relative to the bequest to Robert Salisbury, the testatrix plainly says that under the circumstances and facts of the case now before the court, a "legacy would be payable to his issue or legal representatives."

But where there is a bequest to one, or, in case of his death before the testator, to such legatee's "legal representatives," a lapse will not occur, and the bequest will go to such legal representatives, being his next of kin. Williams on Executors, *1209; Gitting v. McDermott, 2 Myl. & K. 69; Bridge v. Abbott, 3 Bro. C. C. *224; Hawn v. Banks, 4 Edw. Ch. 664; Long v. Watkinson, 17 Beav. 417; Kimbell v. Story, 108 Mass. 382, 384.

Much more clearly would this construction be necessary if the will contained an express provision against lapse, inasmuch as the intent of the testatrix would be more clear. Sibley v. Cook, 3 Atk. 572.

Benjamin Nields, for John Dixon et al.

Codicil, *codicillus*, is defined to be "a little book of writing," is a supplement to a will, or an addition made

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by the testator, and annexed to, and to be taken as a part of a testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator. 2 Blackist. 500; 1 Williams on Executors, 8.

“A last will and testament, or any clause thereof, shall not be altered, or revoked, except by cancelling by the testator, or in his absence (presence), and by his express direction, or by a valid last will and testament, or by writing, signed by the testator, and attested and subscribed in his presence by two or more credible witnesses; but this clause shall not preclude nor extend to an implied revocation.” Rev. Code, chap. 84, § 10; Hall’s Dig. 556, § 3.

The word “will” should be construed to mean “last will and testament,” and to include the “codicil.” Rev. Code, chap. 5, § 13.

Under the statute, a will, or any clause thereof, may be altered or revoked, by a codicil, by a valid last will and testament, by a writing signed by the testator, or by implication.

The right to alter or revoke a last will and testament, or any clause thereof, by codicil is clearly conferred by the statute.

A revocation by codicil may be made where the codicil contains an expressed clause of revocation, or where the terms of the codicil are inconsistent with the provisions of the will.

A will or codicil may operate as a revocation of a prior testamentary instrument by the effect either of an express clause of revocation or of an inconsistent disposition of the previously devised property. 1 Jarman on Wills, 171.

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A codicil likewise, if inconsistent with a preceding will, is, in law, a revocation of it. 1 Powell on Devises, 520.

If a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent. 1 Williams on Executors, § 88.

A codicil is a part of a will, but with the peculiar function annexed of expressing the testator's after-thought or amended intention. The codicil should be construed with the will itself; and from its very nature it may, as a context, confirm, alter or altogether revoke an intention expressed in the body of the instrument to which it is annexed. Schouler on Wills, § 487.

A codicil inconsistent with a previous will is construed very differently from inconsistent clauses in the same will. Thus, where there are separate gifts of the same property to two persons by the same will, the beneficiaries take in common, but if the gifts are made in two separate testamentary instruments, the latter is a complete revocation of the former. Barlow v. Coffin, 24 How. Pr. 54; 1 Jarman on Wills, 173; Evans v. Evans, 17 Sim. 107; 3 Mode. 206; Earl of Hardwick v. Douglas, 7 Cl. & Fin. 795.

If the provisions in the will and codicil are inconsistent, then effect can be given to both without doing violence to either. But if effect cannot be given to both provisions without doing violence to one of them, then they are inconsistent, and one of them must fail. A gift to the heirs-at-law of a legatee and a gift to the issue of a legatee defines two separate and distinct classes of

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persons; "issue" includes only lineal descendants; "heirs-at-law of personalty" under the intestate laws of Delaware embrace collateral as well as lineal descendants and husband and wife.

To give effect to the word "issue," collateral heirs and husband and wife must be excluded; to give effect to the words "heirs-at-law," collateral heirs and husband and wife must be included.

A gift to "issue" includes all who come within that class, and it excludes all who do not come within that class. 3 Myl. & Cr. 697.

Effect cannot be given to both this will and codicil on the theory that, although they are inconsistent, the testator intended to give effect to both, or to use the terms of the will and codicil in the alternative. In other words, that if, in any instance, a legatee dies without issue, then the legacy goes to the heirs-at-law under the will.

There is an inflexible rule that when will and codicil are inconsistent, full effect must be given to the codicil. In certain cases this rule is stated as follows: The dispositions of a will are not disturbed further than is necessary to give effect to the codicil. "Cases to which this rule applies," says Jarman, "are commonly occasioned by the person who frames the codicil, not having an accurate knowledge or recollection of the contents of the prior testamentary paper." This rule is applied to a state of facts as follows:

1. Where a will contains two dispositions to the same person, *i. e.*, a specific and residuary bequest to A., and there is doubt as to whether the codicil revokes both bequests or only one. If full effect can be given

Argument for defendant.

to the language of the codicil by revoking one bequest alone, it is held not to revoke the other. *Wetmore v. Parker*, 52 N. Y. 450; *Quincy's Exr. v. Rogers*, 9 Cush. 291.

2. Where a disposition in the will is clear and specific, a loose and general disposition in the codicil is held not to revoke it. In *re Arrowsmith's Trusts*, 2 DeG., F. & J. 474; *Molyneux v. Rowe*, 8 DeG., M. & G. 368; *Clesbury v. Beckett*, 14 Beav. 583.

3. Where an absolute gift in fee-simple is given under a will, and by a codicil the gift is cut down for the benefit of beneficiaries who fail, and thereby the codicil is rendered absolutely ineffective and inoperative. *Norman v. Kynaston*, 3 DeG., F. & J. 29; *Mench v. Marchant*, 6 Man. & G. 813; *Doe Evers v. Ward*, 18 Q. B. 196.

Absolute interest cut down for a particular purpose remains, so far as these purposes do not take effect, absolute. *Theobald on Wills*, 245; *Lassance v. Tierney*, 1 MacG. 551.

If there is an absolute gift by will, and restrictions are imposed upon the legatee's enjoyment by a codicil, the absolute gift remains so far as the restrictions do not extend. *Norman v. Kynaston*, 2 DeG., F. & J. 29; *Watson v. Watson*, 3 DeG., J. & S. 434; *Theobald on Wills*, 246.

A codicil inconsistent with a will, and without express words of revocation, revokes the will so far as the inconsistency exists. *Bosley v. Balsey*, 14 How. 390; *Kermode v. MacDonald*, L. R., 3 Ch. App. Cas. 583; *Flood v. Houser*, 1 N. & M. 321; *Larrabee v. Larrabee*, 28 Vt. 274.

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A class of distributees named in a codicil different from the class in a will is held to be an inconsistency; and the codicil revokes the class named in the will. Estate of Hunt, 133 Penn. St. 260; Sturgis v. Work, 122 Ind. 134; Warner v. Morse, 149 Mass. 400.

The word "children," in the fourth item of will (the residuary clause), in which the testatrix disposes by seven different bequests of the residue of her estate, is not descriptive of a class, but of particular individuals. Bain v. Lescher, 11 Sim. 397; Workman v. Workman, 2 Allen, 472; Theobald on Wills, 447; Hawkins on Wills, 67; Jarman on Wills, 343.

The intention of a testator is to be collected from the will itself, taking in aid the general rules of construction which have been settled by decision. In construing wills, courts are bound by the words it contains — of the words used they are to declare the plain meaning; should they adopt a different course, they would become the makers instead of the expounders of the will. Kean's Lessee v. Roe & Hofferker, 2 Harr. 115; Wigram on Wills, 66.

George Gray and H. H. Ward, in reply.

The principle laid down in 1 Jarman, *173, relates to two or more wills. The principles relating to construction of a will and a codicil, however, are enunciated in the same volume, beginning with *175, etc.

The case from 17 Simon is one where certain property given by the original will absolutely to A., is by a codicil, given to B. and C. absolutely, by adequate, unmistakable and irreconcilable language.

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The argument as to the inconsistency of the phrases "heirs-at-law" and "issue," is fully met by the points made in our main brief. In passing, however, it is well to note that the quotation from Cottenham, L. C. (3 Myl. & Cr. 697), is a mere *dictum* in the case of Barber v. Barber, there being no class consisting of unnamed persons in that case; that the facts of that case bear no similarity to the facts of this case; and that the Lord Chancellor does not use the phrase *designatio unius est exclusio alterius*. This Latin phrase has, indeed, no application in the construction of a will or codicil; the well-recognized rule of construction in such cases being that only an impossibility that the two provisions can be construed together, and both be given some effect, will justify the rejection of a provision in the original will.

The case of Norman v. Kynaston, cited in the learned solicitor's brief, will bear reading, as it appears in 3 DeG., F. & J. 29. The case of Watson v. Weston, 3 DeG., J. & S. 434, will bear reading for our contention upon this will.

As to the cases cited, and the extracts quoted therefrom, upon the proposition next appearing in the solicitor's brief, to-wit: that "a codicil inconsistent with a will, and without express words of revocation, revokes the will, so far as the inconsistency exists," we would in brief say: that there is no doubt but that cases can be found, probably many more than the learned counsel has cited, of wills and codicils so wholly and absolutely inconsistent that they cannot stand together. In such a case, if the codicil can operate under the facts, it would probably be given effect in preference to the provision

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of the will thereby revoked. Each of such cases cited will, upon careful examination, appear to have had their own peculiar facts, which more or less assisted the court to come to their conclusions.

As above noted, no will case can be cited, in any other will case, as an authority upon which to base a judgment; they all, however, illustrate the principles of law which they enunciate, and affirm general rules of construction which must be applied by each court to different cases and states of facts as they are brought before it.

Bosley v. Bosley, 14 How. 390, is cited also in our brief. The point of the decision is stated by syllabus, as follows: "Whether a residuary clause passes land, the specific devise whereof was revoked by a change of interest by act of the testator after the date of the will, is a question of intent to be decided in each case upon its own circumstances." There were two questions of revocation, one decided for, and the other against a revocation, in this same case. The court decided the one for which Mrs. Orth cites the case, on the ground of implied intent of the testator, and that he apparently intended not to die intestate of any part of his estate.

Kermode v. MacDonald, L. R., 3 Ch. App. Cas. 583, is a case where the conflict raised by words was so plain that in spite of the anxiety of Lord Cairns, Lord Chancellor, to construe the will and codicil together, so as to save the bequest in the body of the will, he was obliged to decide otherwise. This case illustrates the principles of construction insisted on in our main brief.

Larrabee v. Larrabee, 28 Vt. 274, was decided upon its own peculiar facts and upon the evidence of intent gathered from circumstances and various provisions of

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the will. There is, moreover, express words of revocation of the provisions of the will.

By the codicil in Estate of Hunt, 133 Penn. St. 260, there was an express new disposition of the whole estate of the testatrix. The court itself says, in its opinion, speaking of the disposition of the property by the will and codicil: "But that method of distribution is entirely destroyed by the codicil which substitutes a totally different method." Of course, it needs no argument to show how vitally the Hunt case differs from the case before the court.

In the codicil of Warner v. Morse, 149 Mass. 400, there was an express revocation of the bequest in the will and a new one was substituted. It is, therefore, no authority for any principle of implied revocation of a will by a codicil.

Bain v. Bescher, 11 Sim. 397, simply enunciates a rule of construction expressly recognized by our main brief, which is, however, wholly consistent with the contention then made.

Workman v. Workman, 2 Allen, 472, recognizes the same principle as Bain v. Bescher. It also expressly recognizes Jackson v. Roberts, 14 Gray, 551, then just decided by the Massachusetts court, and cited in our brief, as good law.

WOLCOTT, CHANCELLOR.—Hannah Shipley in and by her last will and testament, after certain bequests, directed her executor to divide all her real and personal property into seven equal shares, and in order to make such division, authorized and empowered him to sell all or any part thereof; she then devised and bequeathed the same as follows:

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“ 1st. One of those equal shares to the children of my nephew Joseph Dixon, deceased, viz.: Elizabeth Orth, Olivia Dixon, and Anna Dixon, in equal parts.

“ 2d. Another of those seven equal shares, to my nephew, Samuel Dixon.

“ 3d. Another of those seven equal shares, to the children of my nephew Thomas Dixon, deceased, to-wit: Thomas N. Dixon, Mary Emma Dixon, George Dixon, and Sallie Dixon, in equal parts.

“ 4th. Another of those seven equal parts to my niece Mary Anna Paschall.

“ 5th. Another of those seven equal shares to my niece Emma Bayard.

“ 6th. Another of those seven equal shares to the children of my nephew Thomas Shipley, deceased, to-wit: Hamilton Shipley, Samuel Shipley, Emma Shipley, and Elizabeth Shipley, in equal parts.

“ 7th. And the other of those seven equal shares, to my niece Sarah Bringhurst.” * * * “Provided, always, and I do hereby direct that if any of the devisees or legatees in this, my will, named, shall die before me, then the said devises and legacies shall not lapse, but shall pass and go to such person and persons as would be the heirs-at-law of such devisee or legatee under the intestate laws of the State of Delaware.”

On the 28th day of November, A. D. 1885, the testatrix made and executed a codicil containing the following provisions: “ In case of the death before my death of any of the legatees or devisees named in my will, the share of those dying before me to go to their issue, the said issue to take the share of their deceased parent, except as to any share which would go to Samuel D.

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Paschall." The testatrix then devised to the said Samuel D. Paschall his share for and during his life in trust, and upon his death, to his children or the issue of any of his deceased children freed from the trust.

Olivia Dixon and Anna Dixon, two of the devisees and legatees named in the first class, died before the death of the testatrix without leaving issue. George Dixon, one of the legatees and devisees named in the third class, also died before the testatrix without leaving issue. Mary Ann Paschall, the sole legatee and devisee of the fourth class, died before the testatrix, leaving to survive her, among other children, the said Samuel D. Paschall, referred to above.

Hannah Shipley, the testatrix, died on the 15th day of December, A. D. 1891, and letters testamentary were granted in due course of law to Edward Bringhurst, Jr., the executor named in the foregoing will.

The essential point for determination in this case is whether the shares of Olivia Dixon and Anna Dixon, of the first class of devisees and legatees named in the will, and George B. Dixon, of the third class, who died before the testatrix without leaving issue, devolved upon their respective heirs-at-law or lapsed.

The decision of this question depends upon, whether the clause in the will which provides, "that if any devisees or legatees in this, my will named, shall die before me, then the said devises and legacies shall not lapse, but shall pass and go to such person and persons as would be heirs-at-law of such devisee or legatee under the intestate laws of the State of Delaware," was revoked by the provision in the codicil directing that "in case of the death before my death of any of the devisees or lega-

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tees named in my will, the share of those dying before me to go to their issue," etc.

In order that a codicil shall operate as a revocation of any part of a will, in the absence of express words to that effect, its provision must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention. They are both supposed to be made and executed with the same solemnity and deliberation, and, therefore, both are entitled to the same degree of consideration.

The part of the codicil now before us contains no express words of revocation. It only remains, therefore, to determine whether this particular provision of the will and the codicil are inconsistent or contradictory at all, or whether they are so much so as to justify the conclusion that they are absolutely inharmonious or irreconcilable, under the rules recognized and adopted by all courts for the construction of wills.

The language of the former is so plain and explicit as to leave no room for doubt as to the intention of the testatrix. She expressly declares that the death before her death of any of the beneficiaries named in her will shall not cause the lapse of any of the devises and legacies, but that the shares of those so dying shall pass and go to those persons who would be the heirs-at-law of said beneficiaries under the intestate laws of this State. The language quoted from the latter is equally clear and explicit. In this provision the testatrix declares that the shares of those devisees and legatees who shall predecease her shall go to their issue. I repeat the inquiry: Are these two provisions inconsistent and contradictory? It is very clear that they are not, so far as the death of

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any legatee before the decease of the testatrix, who left child or children that survived her, is concerned. The language of the codicil could not, under such circumstances, change or alter the result which would have occurred, if it had been entirely omitted, and the testatrix had permitted the will to remain without this amendment. According to the codicil, the shares of those devisees and legatees dying before her death are to go to their issue. Exactly the same result would have occurred under the provisions of the will, for the issue of the deceased devisees and legatees would have been their heirs-at-law under the intestate laws of this State. The codicil then simply reaffirms in different language the already expressed intention of the testatrix in the will, if all the devisees and legatees who predeceased her had left issue. They differ widely in range or scope, but they do not differ so far as they express the preference of the testatrix for the children of a deceased legatee. This difference arises by reason of the terms used by the testatrix to designate the substitutes who were to take in the place of those devisees and legatees predeceasing her. In the will the substitutes are denoted by the term "heirs-at-law;" in the codicil, by the term "issue."

Though the words "heirs-at-law" are broader and more comprehensive than the word "issue," yet, the latter is always embraced in the former, though used in its most technical sense. Now, since the term in the will will carry the gift to the persons included in the term "issue," to the exclusion of the collateral heirs of any deceased legatee, how can it be argued that there is any antagonism be-

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tween the intention expressed in the will and the intention expressed in the codicil? If these terms had been used by the testatrix in the order in which they stand to limit the quantity or duration of an estate in lands, and not to indicate the objects of her bounty, as it was clearly her purpose to do, we should be met with a very different condition of things. In such a case the language of the will would have to yield to the language of the codicil, and the donee would take such an estate only as the language of the latter would import.

Thus, up to the point where the direct line of descent terminates, there is no clash between these two provisions. The disputed terms of both are fully satisfied as is forcibly illustrated in the case of Mary Ann Paschall, one of the legatees who died prior to the death of the testatrix, leaving children still living. No objection has been raised, neither could there be to the children of this deceased legatee taking her share, because they answer to the description of the persons entitled under either the will or the codicil.

But just at this point a more serious and embarrassing question arises, and that is whether there is any inconsistency between the provisions of the will and the codicil, as applied to the collateral heirs of a legatee, dying before the testator without issue.

The will declares that upon the death of any devisee or legatee, before the death of the testatrix, the devise or bequest of such deceased devisee or legatee shall not lapse, but shall go to his or her heirs-at-law. The codicil declares, omitting the words "shall not lapse," that the devise or legacy to such deceased devisee or legatee shall go to his or her issue. The will and the codicil

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constitute part of the same testament and they are each in legal estimation equally sacred and inviolate. Any part of the one not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language. There is not a word or a syllable in the second codicil, or any of the others, that can be held to operate as a revocation of the words "shall not lapse," contained in the body of the will. These words must, therefore, remain as an essential part of the last will and testament of the testator. And the intention thereby expressed, against a lapse and a consequent intestacy of any portion of her estate, must be recognized at every stage of the discussion and interpretation of the will. Courts, in such cases, are always very broad and liberal in their views so as to prevent the frustration or defeat of such a clearly expressed purpose as that indicated by the words above quoted.

Nothing is said in the codicil as to those devisees and legatees who shall die before the testatrix leaving no issue to take their parent's share, as was the case with Olivia, Anna and George B. Dixon. Now, if the codicil stood alone, and the only provision against a lapse was that contained in it, a lapse as to the shares of the deceased Dixons would have been the inevitable result. It does not, however, stand alone. It must be construed in connection with the provision of the will, which declares against a lapse and substitutes the heirs-at-law of any original legatee, who died before the testatrix without issue. While it is true the codicil substitutes for such deceased original legatee, his or her issue, but in the event of the death of any original legatee before the testatrix without issue, it provides no substitute to take

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in his or her place. As to that contingency, it is absolutely silent. Now, at the point when the codicil becomes silent, what is there to hinder the will from speaking words, as the only medium left through which to obtain the desire of the testatrix as to the further disposition of such legacy? That is to say, what is there to prevent the will from taking up the legacy of such deceased legatee just where the codicil drops it, and carrying it to its destination, to his or her heirs-at-law, according to the original purpose of the testatrix? Is it not a little singular, at least, that she should have reaffirmed her expressed purpose to avoid a lapse, and then in the next breath increased the chances or possibility of a lapse? It looks as if she had redeclared her intention to do a queer thing and then abandoned the means by which its accomplishment could alone be fully attained. In view of the foregoing consideration, I must confess my reluctance to yield assent to the conclusion that the testatrix intended by the codicil to make a contingency probable, which before was barely possible, upon the happening of which the scheme of distribution so clearly set forth in the original will was liable to a partial if not a total failure.

Fortunately, we are not restricted to these provisions of the will and the second codicil as the only source of light upon this subject. The subsequent provisions of this codicil and certain provisions of the remaining codicils are quite suggestive as to what the testatrix meant in the use of the word "issue" found in the second paragraph of the second codicil.

It may be assumed as generally true, that in all the codicils, with perhaps the one exception, the testatrix

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did not leave in doubt or obscurity her original purpose to avoid a lapse as to any portion of her estate, and as a means to that end to keep it in the same line or course of descent as that prescribed in the body of the will. This is equally true of other codicils in which alterations are made, involving radical or specific changes, as to the share of any legatee who might predecease her without issue. Having arranged the beneficiaries under her will in classes composed, I believe, of nieces and nephews, she directed the great bulk of her property to be distributed among them in equal shares. She seems to always have had in mind the desire that the share of each legatee so dying should go to the surviving member of his or her class, or to his or her next of kin. The testatrix never made herself the stock or root from whom the degree of kinship should be computed or reckoned in ascertaining who the takers of any legacy would be in case of the death of any legatee before the death of the testatrix, in that event.

And now, to-wit: This 26th day of September, A. D. 1894, the above-stated cause having come on to be heard before the Chancellor, and argument of counsel having been heard thereon, and the same having been maturely considered, it is hereby ordered, adjudged and decreed that the shares of the said Olivia F. Dixon, Anna Shipley Dixon and George B. Dixon, in the estate of and under the will of Hannah Shipley, deceased, did not lapse upon their decease without issue before the said testatrix, but the said shares of the said Olivia F. Dixon, Anna Shipley Dixon and George B. Dixon, descended and came to and upon their heirs-at-law, to-wit: that the said

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shares of the said Olivia F. and Anna Shipley Dixon descended and came to and upon their surviving sister, Elizabeth B. Orth, and that the said share of the said George B. Dixon descended and came to and upon Thomas N. Dixon, Mary Emma Dixon and Sallie B. Dixon, in equal shares.

And that the said Edward Bringhurst, Jr., executor of Hannah Shipley, deceased, is hereby ordered, instructed, directed and decreed within sixty days from the date of this decree, to pay over and deliver unto the said Elizabeth B. Orth, the said shares under the said will of the said Olivia F. Dixon, deceased, and the said Anna Shipley Dixon, deceased, and unto the executor of the said Thomas N. Dixon, deceased, and unto Mary Emma Dixon and Sallie Dixon, in equal shares or parts, the said share under said will, of the said George B. Dixon, deceased, in accordance with this decree.

And it is further ordered, adjudged and decreed that the costs in this cause are taxed at the sum of \$63.50, and that the same shall be paid by the said executor, the complainant, out of the general funds of the said estate.

Syllabus.

JAMES PARKER v. HIRAM YERGER.

New Castle, September Term, 1894.

Trusts; Powers — execution of; Deeds; Cloud on title; Specific performance.

M. B., being the owner of one-fourth interest in certain lands, made a deed in trust to E. B. for her own benefit, with power to the trustee to sell on her written order. J. P. purchased and obtained a deed for the other three-fourths interest in said lands, and also paid to M. B. the price for her said one-fourth interest, and obtained a deed from E. B., the trustee, therefor. This last deed purported to be an execution of the power to sell contained in the original trust deed, but referred to no written order from M. B. except by stating that M. B. had written a letter stating that "I give my sanction to the arrangement mentioned in Joseph's letter, and desire Edward to do what is needful," which said letter was written by M. B. as and for such an order. J. P. went into possession of said lands and has occupied same for over twenty years. Afterwards, upon the death of E. B., the trustee, a deed of confirmation of said last deed was made to J. P. by the eldest male issue of the trustee, and by all the heirs-at-law of M. B., she having also died. There were judgments against two of the said heirs prior and at the time of the execution of said last deed of confirmation. On bill for specific performance by J. P. against H. Y. on an agreement by H. Y. to purchase a clear title to said lands, free of incumbrances,—Held, that J. P. could give such a title.

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BILL FOR SPECIFIC PERFORMANCE.— Bill filed by James Parker against Hiram Yerger to compel the specific performance of certain articles of agreement entered into between them for the purchase and sale of land.

James Parker, the complainant, being in possession of a lot of land in the City of Wilmington, on the 1st day of January, A. D. 1895, entered into certain articles of agreement in writing with Hiram Yerger, the respondent, by which it was covenanted and agreed on the part of the said James Parker that he would, on the 20th day of February then next following, convey and assure to the said Hiram Yerger a good and sufficient title in fee-simple to the said lot of land, free and clear of all incumbrances; and by which said agreement also, it was covenanted on the part of the said Hiram Yerger that he would, on the sealing of the said agreement, pay \$250 in cash as forfeit money in the event of his non-compliance with the further terms of said agreement, and that the remainder of the whole consideration money for said lot of land, being the sum of \$6,500, should be assured to the said James Parker, part thereof by a subsequent payment in cash, and the residue by a purchase-money mortgage to be executed upon the delivery of the said deed or deeds.

On the 20th day of February following the execution of the said articles of agreement, the said James Parker tendered himself ready and willing to perform his covenants as set forth in the agreement, and offered to the said Hiram Yerger a deed of bargain and sale purporting to convey the said lot of land to the said Hiram Yerger in fee-simple, clear of all incumbrances. Hiram Yerger then refused to accept this deed or to perform his cove-

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nants, claiming that the said James Parker had not, and never had, any good and legal title, in fee to the whole of said land, and, that if he did have such a title, it was subject to certain liens and incumbrances which stood on the records against one Margaret R. Bringhurst, and also John R. Bringhurst.

Prior to the possession of, or claims of title to, the lot in question by the said James Parker, a one-fourth interest therein is admitted to have been the property of one Mary D. Bringhurst; and it is as to James Parker's right and title to this one-fourth interest that forms the question of controversy in this case, the said Parker having an undisputed title to the other three-fourths. The said Mary D. Bringhurst, being so seized of the said one-fourth interest in said lot of land, did by indenture bearing date the 1st day of May, A. D. 1842, convey and assure unto Edward Bringhurst and Davis H. Hoopes certain real and personal property, including the one-fourth interest in question in trust for the sole use and benefit of the said Mary D. Bringhurst during her natural life; and in further trust, to sell and convey by deed duly executed, the said one-fourth interest when the said Mary D. Bringhurst should request, and to such person or persons as she should designate, either by her last will and testament or by any other instrument whatsoever. Subsequently the said Mary D. Bringhurst intermarried with one George V. Moody, and the said Mary D. Moody and George V. Moody, her husband, by indenture bearing date the 12th day of December, A. D. 1842, did fully ratify and confirm the deed of trust to the said Edward Bringhurst and Davis H. Hoopes. And said Davis H. Hoopes after-

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wards ceased, by legal formalities, to be cotrustee with the said Edward Bringhurst; and the said Edward Bringhurst became sole trustee for the said Mary D. Moody under the terms of the deed of trust; and the said Edward Bringhurst, sole trustee, by indenture bearing date the 18th of December, A. D. 1863, conveyed and assured unto the said James Parker, in fee, the one-fourth interest in question, and the said Mary D. Moody, by a writing under her hand, dated the 31st day of October, A. D. 1863, authorized and requested the said Edward Bringhurst to convey the above described property in the words following: "I give my sanction to the arrangement mentioned in Joseph's letter, and desire Edward to do what is needful," the said words occurring in a letter from Mary D. Moody to Joseph and Edward Bringhurst in reply to a previous letter from Joseph to her informing her that the title to her interest in said property could not be conveyed without her consent, etc. Subsequently, the said George V. Moody and the said Mary D. Moody both died, the said Mary D. Moody being the survivor, and died in the year 1886, intestate, leaving to survive her as her only heirs-at-law Edward Bringhurst, Jr., Margaret R. Bringhurst, John R. Bringhurst and William Bringhurst; and the said Davis H. Hoopes and Edward Bringhurst, said former trustees, also died — the said Hoopes in the year A. D. 1880, and the said Bringhurst in the year A. D. 1884. The said Edward Bringhurst, Jr., the eldest male issue of the said Edward Bringhurst, sole trustee, and Edward Bringhurst, Jr., Margaret R. Bringhurst, John R. Bringhurst and William Bringhurst, the said heirs-at-law of the said Mary

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D. Moody, by indenture dated the 31st day of January, A. D. 1895, conveyed the one-fourth interest in question of the said Mary D. Moody to the said James Parker in fee.

The said James Parker paid unto the said Edward Bringhurst, trustee for Mary D. Moody, the purchase money for the one-fourth interest in said land of the said Mary D. Moody, and has occupied said land from 1863 to the present time.

The questions raised on argument were:

1. Was the deed of Edward Bringhurst, as sole trustee of Mary D. Bringhurst, to James Parker, a proper execution of the power of sale and conveyance provided for and authorized in the trust deeds of Mary D. Bringhurst to Edward Bringhurst and Davis Hoopes in trust, and of Mary D. Bringhurst, as Mary D. Moody, and her husband to the said Edward Bringhurst and Davis H. Hoopes to confirm said first deed in trust.

2. If said deed was not a proper execution of the power and sale and conveyance so provided for and authorized, did the powers so vested in the said Edward Bringhurst, as trustee, descend to and upon his eldest male issue, Edward Bringhurst, Jr.?

3. If the answer be "no" to either of these questions, did not Mary D. Bringhurst's right and title to the one-fourth interest in the lot in question descend to her heirs-at-law, Edward Bringhurst, Jr., Margaret R. Bringhurst, John R. Bringhurst and William Bringhurst, and as their property become subject to certain liens standing against two of the said heirs, Margaret R. and John R. Bringhurst?

Argument for complainant.

H. H. Ward, for complainant.

The hearing takes place upon the bill and answer, which admits all substantial allegations of the bill, except that James Parker has a clear and unincumbered title to the premises in question. The sole question involved is the question of title, the complainant being ready to convey and the defendant ready to accept the property, if, upon the judgment of this court, the complainant can convey "a title in fee-simple, clear of all incumbrances and all manner of liens whatsoever." The title of the complainant depends upon the various exhibits appended to the bill of complaint, together with such facts as appear on the face of the bill of complaint, which have been admitted by the answer. The only alleged liens or incumbrances involved are the judgments against John R. Bringhurst and Margaret R. Bringhurst in the answer of the defendant.

The deeds running directly to James Parker are the deeds of Edward Bringhurst, trustee, to the said James Parker, bearing date the 18th day of December, A. D. 1863, and the deed of Edward Bringhurst, Jr., eldest male heir of Edward Bringhurst, trustee for Mary D. Moody, deceased, Edward Bringhurst, Jr., and wife, Margaret R. Bringhurst, John R. Bringhurst and wife, and William Bringhurst, heirs-at-law of the said Mary D. Moody, deceased, to the said James Parker, bearing date the 31st day of January, A. D. 1895. The only questions which involve the title to the premises arise upon the said deed of Edward Bringhurst, trustee, to James Parker. The questions arising out of that deed run back through that deed to the deeds of Mary D.

Argument for complainant.

Bringinghurst to Edward Bringinghurst and Davis H. Hoopes, trustees, bearing date the 1st day of May, A. D. 1842, the deed of Mary D. Moody (formerly Bringinghurst) and George V. Moody to the said Edward Bringinghurst and Davis H. Hoopes, trustee, bearing date the 12th day of December, A. D. 1842, and the deed of Davis H. Hoopes, Mary D. Moody and George V. Moody, her husband, to said Edward Bringinghurst in trust, bearing date the 9th day of November, A. D. 1843. The question arising under said deed of Edward Bringinghurst, trustee, to James Parker, is whether that deed is a proper execution of the power of sale and conveyance provided for and authorized in the deeds of Mary D. Bringinghurst to Edward Bringinghurst and Davis H. Hoopes, trustees, and Mary D. Moody and George V. Moody, her husband, to the said Edward Bringinghurst and Davis H. Hoopes, trustees.

If the court should be of the opinion that the deed of Edward Bringinghurst, trustee, to James Parker does not constitute a proper execution of the sale authorized by the deed of trust of Mary D. Bringinghurst, the court will be asked to consider whether the deed of Edward Bringinghurst, Jr., eldest male heir of Edward Bringinghurst, trustee for Mary D. Moody, deceased, Edward Bringinghurst, Jr., and wife, Margaret R. Bringinghurst, John R. Bringinghurst and wife, and William Bringinghurst, to the said James Parker does not fully cure such defective execution of the power of sale, being a deed from the eldest male heir of a sole trustee, in which all the heirs-at-law of the *cestuis que trust* have joined, and being a quitclaim deed and a confirmation deed to said James Parker, the present holder. Whether this confirma-

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tion deed amounts to a full and complete curing of this title will depend upon certain other legal considerations. In behalf of the defendants, it will probably be claimed that upon the death of Mary D. Moody the trust originally created by her deeds became a dry or passive trust, and that thereupon it must be presumed that the trustee has done the only thing which was left for him to do, and has conveyed the legal estate to the heirs-at-law of Mary D. Moody; and that, as a consequence, judgments recovered against Margaret R. Bringham and John R. Bringham, who were certain of the heirs-at-law of Mary D. Moody, would attach to said lands as liens. And the defendant will consequently further contend that the said deed of confirmation could not bind such creditors or bar their rights in the premises, being *res inter alios acta*.

In opposition to this contention of the defendant it will be maintained by the complainant:

First. That the words of limitation in the deeds creating the original trust were such as vested in the trustees a full fee-simple title, and that the powers of the trust require that such fee-simple title should be vested in said trustee, inasmuch as they were authorized under certain circumstances to convey a fee-simple title.

Second. That mere lapse of time, or the fact that the trust has become a dry trust, or that there is no particular purpose which requires separation of the legal and equitable estates, will not raise a presumption of a surrender or reconveyance of the legal estate by the trustees.

Third. That there are no facts before the court which can be cited as evidence, indicating, or tending to prove,

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that such a surrender or reconveyance was ever made of the legal title by the trustees; but that, on the other hand, it appears that James Parker, and not the heirs-at-law, has been the occupant of the land in question from 1863 down to the present date, holding under an adverse title to the heirs-at-law, and under a color of title, and that there is an express admission on the part of the heirs-at-law of Mary D. Moody, in the deed of January 31, A. D. 1895, being the deed of Edward Bringhurst, Jr., eldest male heir of Edward Bringhurst, trustee for Mary D. Moody, deceased, Edward Bringhurst, Jr., and wife, Margaret R. Bringhurst, John R. Bringhurst and wife, and William Bringhurst, to the said James Parker; that such surrender and reconveyance never took place, but that such legal estate remained in the trustee until his death, and thereupon devolved upon Edward Bringhurst, Jr., his eldest male heir.

Fourth. That there will be no presumption of the reconveyance or surrender of a legal title by a trustee to the *cestuis que trust*, or her heirs-at-law, when such a presumption would defeat a just title.

Fifth. That, as a matter of law applicable to the facts in this case, the legal estate did remain in the said Edward Bringhurst, trustee, and in his eldest male heir, Edward Bringhurst, Jr., until the conveyance of the same to the said James Parker, by the deed of January 31, A. D. 1895, aforesaid, being the confirmation deed; and, therefore, that such confirmation deed cured every defect of title complained of by the defendant, including the supposed lien of said judgments against Margaret R. Bringhurst and John R. Bringhurst.

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And in further answer to said contention of the defendant, it will be further maintained that granting for the purposes of argument that by legal presumptions, or by operation of law, the legal estate was, on the death of Mary D. Moody, duly vested in her heirs-at-law; that as it cannot be contended but that James Parker actually bargained for the land in question, including Mary D. Moody's interest therein, and actually paid full consideration therefor, such legal estate so vested in said heirs-at-law of Mary D. Moody would come down to them as a dry or constructive trust for the said James Parker; and that, as a first consequence, the said heirs-at-law of Mary D. Moody would be bound to convey the same to James Parker upon his request; and, as a second consequence, that the judgments against such heirs-at-law of Mary D. Moody would not be effective liens thereon, and that even under the contention of said defendant said confirmation deed of January 31, A. D. 1895, being exactly what a court of equity would have ordered under the circumstances and in the premises, would be a complete and perfect cure of such defects in the title.

And lastly, in reply to the said contention of the defendant, it will be maintained that the said James Parker, having held said title by adverse and continuous possession of the premises, under color of title, for upwards of twenty years, to-wit, for a period of thirty-one years and upwards, that the title of the said James Parker is, therefore, full and complete thereto under the laws of the State of Delaware.

The propositions of law upon which the argument of the complaint is based will be as follows: No at-

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tempt has been made to make an exhaustive citation of authorities, because all of the propositions invoked are well recognized, and only such authorities are cited as are most readily available and as will be sufficient to call the attention of the court more completely to the law.

A suit for the specific performance of a contract for the sale of lands may be maintained by the vendor. 22 Am. & Eng. Ency. of Law, 947, etc.

The vendor, to maintain an action for specific performance of a contract for the sale of land, must be ready and able to convey a marketable title, which is defined as "a title that is free from reasonable doubt." 22 Am. & Eng. Ency. of Law, 948-962 and notes.

The deed of Edward Bringhurst, trustee, to James Parker, bearing date the 18th day of December, A. D. 1863, was in fact a substantial and even a strict compliance with the condition provided in the original trust deeds. In the deeds creating this trust it was provided that such trustees should hold the land, *inter alia*, "in further trust that the said parties of the second part shall sell and convey, by deed duly executed, the above-described property, real and personal, or any part thereof, when the said Mary may request, to such person or persons as she may designate, either by her last will and testament or by any other instrument whatsoever." Under this provision any writing in which the said Mary D. Moody should convey to the trustee her authority to sell and transfer the land in question to any person would be adequate for such purpose. Even a simple letter, being a part of a correspondence between the trustee and the *cestuis que trust*, would, if it sufficiently

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appeared in the deed what such correspondence was, and the purport thereof, be a sufficient authority and direction, because such a letter would for this purpose be an "instrument." A reading of the deed of Edward Bringham, trustee, to James Parker clearly shows that such an instrument came into the hands of the trustee, authorizing him to make this sale and conveyance. The recitals of this deed bind all parties and privies thereto. If the court is satisfied from the reading of this deed that such a letter was written, transmitting the proper authority to the trustee to make this conveyance, and that the trustee in said deed acted thereon and pursuant thereto, the title made by such deed must be considered free from reasonable doubt, and, therefore, a good title and such as this defendant should be ordered to accept. In this connection, also, it should be considered by the court that there is no evidence that there has ever been any claim on the part of anyone during the last thirty-one years and upwards; that the authority so recited in said deed of trust was not considered sufficient by the said Mary D. Moody and her heirs-at-law for all purposes, and that the lapse of such a period of time now constitutes a complete bar to any future claim; that such authority was not adequate, or that the trustee did not strictly follow the course laid down for him in the said deed of trust. Hill on Trustees, *264, note, *267; Perkins v. Cartmell, 4 Harr. 270, 277.

If, however, the court be of the opinion that the title carried by the deed of Edward Bringham, trustee, to James Parker is not free from reasonable doubt, we

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must turn to the other consideration of law and fact outlined in the earlier part of this argument.

A reference to the deeds creating the trust in question will show that the first deed, being the deed of Mary D. Bringhurst to Edward Bringhurst and Davis H. Hoopes, trustees, was inartistically drawn, there being no words of limitation to the heirs and assigns of the trustees. The second deed, however, being the deed of Mary D. Moody and George V. Moody, her husband, confirming the trust, after the marriage of the said Mary D. Bringhurst to the said George V. Moody, leaves nothing to be desired on the point of technical language, inasmuch as the lands in question are in that deed conveyed to the said Edward Bringhurst and Davis H. Hoopes, their heirs and assigns, "to have and to hold the same unto the said Edward Bringhurst and Davis H. Hoopes, their heirs and assigns, to their only proper use and behoof, in trust," etc., so that under the second deed not only the legal estate but the first use is vested in the trustees, which formula, under the Statute of Uses, would vest in them the legal estate in fee-simple and make every subsequent use a trust. In addition to this technical verbiage, there appears also in the object of the trust a reason why they should take a fee-simple title, inasmuch as they were bound under certain conditions to convey a fee-simple. Hill on Trustees, *248, *250, *251, *235, *231; Lore's Lessee v. Hill, 3 Harr. 530, 537, 538.

The mere lapse of time, or the fact that the trust has become a dry trust, or that there is no particular purpose which requires separation of the legal and equitable estates, will not raise a presumption of a surrender

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or reconveyance of the legal estate by the trustees. *Lore's Lessee v. Hill*, 3 Harr. 530-537; *Hill on Trustees*, *253, *256, *257; *McMullin v. Lank*, 4 Houst. 648, 655.

This trust is not in its creation a dry or passive trust, and the Statute of Uses will not act thereon. *Hill on Trustees*, *229, *230.

In order that there should be a presumption that the trustee has surrendered or conveyed the legal estate, there should be facts before the court which tend to prove that such surrender or reconveyance was made. In this case, however, no such facts appear, but, on the other hand, it does appear that James Parker and not the said Mary D. Moody, or her heirs, has been in possession of the premises, and claiming a title ever since the making of the deeds of 1863:

In addition to this negative evidence of nonoccupancy by Mary D. Moody, or her heirs, and the positive evidence of the possession and claim of James Parker, there is an express admission on the part of the heirs of Mary D. Moody in the confirmation deed of January 31st, 1895, that such surrender and reconveyance never took place; but, on the other hand, that the legal title remained in the trustee and his eldest male heir until it was conveyed by him in the confirmation deed to James Parker. *Hill on Trustees*, *253, *256, *257.

There is, however, in this case an additional and strong reason why a reconveyance and surrender by the trustee of the legal estate will not be presumed. The doctrine of presumption of reconveyance or surrender of the legal estate is an equitable one and intended to perfect and

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secure the legal and equitable rights of all parties. It cannot be invoked to perpetuate a fraud.

In this case a presumption of a reconveyance would defeat the just title of James Parker, a purchaser, and would be a practical fraud upon him. The general principle is stated as follows: That there will be no presumption of the reconveyance or surrender of a legal estate by a trustee to the *cestuis que trust*, or her heirs-at-law, when such a presumption would defeat a just title. Hill on Trustees, *253-*262.

The doctrine enunciated by the court in McMullin v. Lank, 4 Houst. 648-655, above cited, might possibly be called in, if the rights and equities of the creditors of Margaret R. Bringhurst and John R. Bringhurst were the only ones involved. There is, however, in this case the right and equity of a purchaser which attached to this land thirty years before the judgments against the Bringhursts were obtained. In this case, therefore, the doctrine that between two equal equities the prior or older shall prevail, would prevent the application of the doctrine of presumed reconveyance to this case.

We are, therefore, drawn to the conclusion upon this line of reasoning, and upon the authorities aforesaid, that the legal estate in the lands in question did remain in Edward Bringhurst, trustee, descended to Edward Bringhurst, Jr., his eldest male heir, and were by him conveyed in the deed of January 31st, A. D. 1895, aforesaid, to James Parker. If this reasoning be correct, the confirmation deed of 1895 vested in James Parker the entire legal and equitable estate in this land, and there was never any legal estate in John R. Bringhurst or Margaret R. Bringhurst to which the judgments against

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them could attach, and James Parker is, therefore, the owner, and can convey to the defendant a title in fee-simple, clear of all incumbrances and all manner of liens whatsoever.

If it be the opinion of the court, however, that by legal presumption or by operation of law the legal estate was, on the death of Mary D. Moody, duly vested in her heirs-at-law, the conclusion of the court in this case must be the same as that which is drawn in such cases in the preceding argument. It is admitted that James Parker actually bargained for the land in question, including Mary D. Moody's interest therein, and actually paid full consideration therefor. This bargain and sale and payment of consideration raised *ipso facto* a constructive trust in favor of said James Parker, because it would be contrary to conscience that Mary D. Moody should receive the purchase money for lands, under a contract of sale, and retain the title thereto. If, therefore, the legal estate vested in her heirs-at-law, upon her decease, such legal estate came down to such heirs in trust for the said James Parker, and such heirs-at-law were bound to convey the same to James Parker upon his request. 10 Am. & Eng. Ency. of Law, 60, 61, and notes; Hill on Trustees, *144, *171.

The legal estate which the heirs of Mary D. Moody would receive by this chain of reasoning, being held in trust for James Parker, would not, of course, be subject to the lien of judgments against such heirs-at-law. Hill on Trustees, *269.

These heirs-at-law, by their deed, therefore, did exactly what a Court of Chancery would have compelled them to do, when they conveyed their interest in

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said lands to James Parker, and, therefore, from this point of view, also, said confirmation deed corrects all defects in the title in question. 18 Am. & Eng. Ency. of Law, 980-984, and notes.

But outside of any confirmation deeds, the title of James Parker to the lands in question is, under our law, complete by adverse possession. In this case, by the deed of Edward Bringhurst, trustee, to James Parker, of 1863, there was an open and express denial of the right of the *cestuis que trust* to this land, which was then placed of record, so that for such trustee, and the persons holding under him, the Statute of Limitations began then to run. Lore's Lessee v. Hill, 3 Harr. 530-535; Perkins v. Cartmell, 4 id. 270-277; Hill on Trustees, *264, and notes, *267.

Considering the continuous and adverse possession of James Parker for the last thirty years by itself, and unassociated with that of the trustee, the title of James Parker, based upon such opposition, becomes still clearer. Code, 1893, chap. 122, §§ 1, 2, p. 87; Perkins v. Cartmell, 4 Harr. 270, 277; Inskeep v. Shields et al., id. 345, 346; Bright v. Stephens, 1 Houst. 31-34; Bartholomew v. Edwards, id. 17, 22, 23.

Harry Emmons, for respondent.

WOLCOTT, CHANCELLOR.— Let the decree be entered as follows:

And now, to-wit, this 25th day of February, A. D. 1895, the above-stated cause having come on to be heard upon bill and answer, and the arguments of counsel having been made thereon, and it appearing to the court

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that the said James Parker, said complainant, is seized of, in and to the said lands and premises, in said bill of complaint described, in his demesne as of fee, and that he can convey a clear and unincumbered title thereto, it is hereby ordered, adjudged and decreed that the said Hiram Yerger, said defendant, specifically perform the said agreement for the sale of the lands and premises in said bill of complaint set forth, and that said defendant pay unto the said complainant the remainder of said purchase money in said agreement for sale mentioned; and it is further ordered and decreed that upon the payment of the whole of said purchase money by said defendant to said complainant, the said complainant shall make, execute and deliver a proper conveyance of said lands and premises to the said defendant, and let the said defendant into the possession of said premises, according to said agreement of sale.

And it is further ordered that the said complainant pay the costs of this proceeding, and said costs are hereby taxed at the sum of \$31.66.

Syllabus — Statement — Argument for defendant.

JESSUP & MOORE PAPER COMPANY v. PETER J. FORD.

New Castle, March Term, 1895.

Attachment for contempt — practice; Injunctions — practice.

1. A person cannot be punished for the performance of an act which is prohibited by an order or decree of the court which has never been published.
2. To enjoin or restrain a party from committing an act which in itself would not be injurious to the party complaining, would be an improper exercise of this extraordinary power of this court.
3. On attachment for contempt for not obeying an injunction, where the evidence on both sides is so strong and irreconcilable as to raise a grave doubt, the rule will be discharged.

ATTACHMENT FOR CONTEMPT.—Rule to show cause why Peter J. Ford should not be punished for contempt in consequence of an alleged violation or breach of an injunction.

John Biggs and H. H. Ward, for defendant.

Mr. Biggs moved that the rule laid against Peter J. Ford, to show cause why he should not be punished for violation of this injunction, be dismissed on the ground that Peter J. Ford cannot be punished for violation of this injunction, because the property which he owned at the time the injunction was issued, that is, the property concerning the operation of which the injunction was is-

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sued, is not at the present time owned by Peter J. Ford, but by the Ford Morocco Company.

Obligations of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them. Beach on Injunctions, §§ 261, 268; High on Injunctions, § 862; Iveson v. Harris, 7 Ves. Jr. 251; Standard Stock Farm v. National Trotting Association, 9 N. Y. Supp. 898, 907; Mexican Ore Co. v. Guadeloupe, 47 Fed. Rep. 351; Van Zandt, Trustee, v. Argentine Mining Co., 2 McCrary, 642.

A violation of an injunction by one person, although practically not in interest with another person, will not be construed as a violation on the part of the person charged. Boyd v. State, 19 Neb. 128.

An injunction running against the owner or proprietor of a property cannot be enforced against an assignee or lessee of the property. This case shows strictness of construction and application of injunction. Buhlman v. Humphrey, 53 N. W. Rep. 318.

One, not a party to a suit in such an injunction as issued, and to whom such injunction is not directed, cannot be held in contempt, or be punished for violation of the writ, although the act prohibited be illegal in itself. Barths v. Larquie, So. Rep. 80.

Where, upon contempt proceedings, it appears the conditions have changed and there is doubt about the violation of the injunction by the defendant under such changed conditions, the court will not try such new issue upon such contempt proceedings, but will remit the complainant to a supplemental bill. 1 Beach on Injunctions, § 264.

Argument contra — Opinion.

E. G. Bradford, L. C. Bird, and W. Saulsbury, *contra*.

To render one liable for a violation of an injunction, it is not necessary that he should have actually committed the breach in person; anyone who is present, aiding and abetting in the commission of the act, or who permits it to be done in his presence and without remonstrance, is himself guilty of an actual breach of injunction and will be punished accordingly. And it is to be observed that the violation of the spirit of an injunction, even though it strictly may not have been disregarded, is a breach of the mandate of the court. An injunction is to be obeyed according to its spirit. High on Injunctions, §§ 861, 866; Rapalje Contempts, §§ 40, 42, 45; Kerr on Injunctions, 646; Mayor, Aldermen, etc. v. N. Y. & S. I. Ferry Co., 64 N. Y. 622.

An injunction cannot be violated indirectly. In re Tift, 11 Fed. Rep. 463; Iowa Barbed Wire Co. v. S. B. W. Co., 30 id. 123; Stinson v. Putnam, 41 Vt. 238; Cook on Stockholders, etc., § 756; Wells, Fargo & Co. v. Oregon Ry. & Nav. Co., 19 Fed. Rep. 20; Morton v. Superior Court, etc., 64 Cal. 496; State of Montana v. Fourth Judicial District Court, 34 Penn. St. 39; The Society, etc. v. Distilling Co., 42 Fed. Rep. 96.

WOLCOTT, CHANCELLOR.— I propose now to announce my decision — not opinion — in the case of the Jessup & Moore Paper Co. v. Peter J. Ford.

Perhaps the magnitude of the interests involved in this case and the great skill and ability with which it was conducted by counsel on both sides, would seem to demand a more elaborate treatment of the subject than

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the mere decision either discharging the rule or making it absolute; but I have determined to decide or dispose of the matter upon the evidence submitted entirely, without reference to the legal propositions that were raised at the threshold of the hearing of this rule. My decision will be a conclusion of fact and not of law, which makes it unnecessary to prepare an extended opinion.

To have prepared an opinion involving a complete review of the testimony would have entailed an amount of labor which I did not care to undergo. In fact, I was not able to do it if I had been so disposed.

On the 24th day of November, 1886, an injunction was issued, directed against Peter J. Ford, Thomas Ford and Thomas F. Ryan. Last spring — some time last April, I believe — a rule was laid upon Peter J. Ford to show cause why he should not be punished for contempt in consequence of an alleged violation or breach of the injunction issued in 1886, Peter J. Ford being the only survivor of Thomas Ford and Thomas F. Ryan, deceased. At the hearing of the rule, a motion was made to dismiss the rule upon the ground that the factory had become the property of, and was operated by a corporation known as, the Ford Morocco Company, and was not the property of Peter J. Ford, nor was it under his control. That was the basis of the motion.

At the conclusion of that argument, and before any further step was taken, an amended injunction had been discovered and presented to the court for its consideration in determining that preliminary question.

Now, I do not propose to decide that question one way or the other. I propose to decide this case upon its merits as disclosed by the facts in this case. If I attempted to

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so decide it, I should be confronted with this difficulty: The late Chancellor Saulsbury evidently thought that Peter J. Ford, as an individual, could not be punished for contempt under the original injunction; and the fact that he signed an amended injunction is proof that there was present in his mind a doubt as to the power of the Chancellor to thus punish him under the changed conditions; that is, the transfer of the property to the corporation.

If the amended injunction was necessary in order to punish Peter J. Ford, or the corporation of which he was a member, then there could have been no violation of this amended injunction, because it had never been published or made known. He had no knowledge of it, and certainly a man cannot be punished for the performance of an act which is prohibited by an order or a decree of the court which has never been published.

As I said before, I do not propose to decide that question. I shall dispose of this case entirely upon its merits and leave the question of law untouched. I shall do that very briefly.

There was very strong testimony on the part of the complainant that Peter J. Ford was guilty of a violation of, or a breach of, this injunction, and if the case had depended upon the testimony of the complainant he certainly would have been proven guilty.

But Peter J. Ford met that testimony with evidence quite as strong, if not stronger, showing his innocence.

I believe it was conceded on both sides that, unless some damage or injury resulted to the complainant because of the discharge of fluid, liquid, or any other matter from that factory, or otherwise, he could not be held

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guilty. This is undoubtedly true, for to enjoin or restrain a party from committing an act which in itself would not be injurious to the party complaining would be an improper exercise of this extraordinary power of the court.

As I have already said, there is strong testimony on both sides, and in the presence of such a decided conflict of testimony, which is entirely irreconcilable, how can any mind escape doubt — a serious and grave doubt — that this defendant is guilty of a breach of the terms of that injunction, assuming now that Peter J. Ford, though not the owner of this property, can be guilty of a contempt?

In view of the fact of this grave doubt existing in my mind, it is utterly impossible for me to decide that Peter J. Ford is guilty of any contempt. There is a serious doubt in my mind, and that doubt must control, because of the consequences that would follow; and there being such a doubt, the defendant in this case is entitled to the benefit of that doubt, and I so decide.

This rule must be discharged.

Syllabus.

WILLIAM ALLEN et al. v. JAMES LEACH, Administrator
d. b. n. c. t. a. of WILLIAM ALLEN, Deceased.

New Castle, March Term, 1885.

Executors and administrators — remedies against — liabilities of, in individual and representative capacity — decrees pro confesso against; Writ of sequestration de bonis propriis; Devastavit; Practice.

1. A decree *pro confesso* against an administrator, is a decree, in form, *de bonis testatoris*, and if there are tangible assets in his hands, then process appropriate to that form can alone be had; but if a *devastavit* has been committed, and there are no available assets, then recourse may be had against him in his individual capacity.
2. In a suit against an executor or administrator, when he has been guilty of neglect or waste, he necessarily appears in a double role, as a defender of himself in both his representative and individual character. If his liability as the representative of the deceased is established, it would be conclusive as to his liability as an individual co-extensive with that as administrator. The liability in either case is ascertained in the same way, and by the same degree of proof. The defenses are also the same.
3. If an executor or administrator in a suit against him in his representative capacity, pleads *plene administravit*, and on issue it is found against him, his liability to the extent of assets found in his hands, is fixed; and if they be not forthcoming, he must answer out of his own property.
4. The word "administrator" is descriptive only of the person who has taken upon himself the responsibility of administering the estate of a deceased person. As to the property of the deceased, the administrator stands in his place to dispose of it as the law directs. When

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the heirs or creditors desire to reach it, it can only be done through himself, and whenever it is found that a *devastavit* has been committed, his own property can alone be reached through the same channel.

5. The remedy upon administration or testamentary bonds is cumulative, and not substitutional.
6. Bill filed by complainants, legatees, to recover their legacies from the respondent, the administrator, on two accounts corrected on exceptions by the Orphans' Court; the respondent pleaded *laches*, Statute of Limitations, and a pending right of appeal, but failed to add the affidavit that said pleas were not made for delay; complainants moved for a decree *pro confesso* for want of such affidavit, which was granted "or attachment in thirty days;" on expiration of this time, and failure to comply with this decree, complainants moved for a rule to show cause why decree had not been performed, or why attachment should not issue, which was refused, it appearing that respondent, although owning valuable real estate, was unable to raise the requisite amount. Held, that a writ of sequestration *de bonis propriis* should be granted, a *devastavit* having been committed.

BILL IN EQUITY.— Bill filed by certain of the legatees under the last will and testament of William Allen, deceased, to recover from James Leach, the administrator, *de bonis non*, with the will annexed, their respective legacies or distributive shares of the funds shown to be in his hands by a corrected account on file in the register's office in and for New Castle County.

R. G. Harman and J. H. Whiteman, for complainant.

Assuming, for the sake of argument, that there is no *devastavit* charged in the bill, and that the action was

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brought against, and the decree was found against, the defendant in his representative capacity as administrator, what would be the nature of the executions to enforce such decree?

The execution in the first instance would be, as to the principal debt, *de bonis testatoris, et si non*, then as to the costs *de bonis propriis*.

Then, in the second instance, it would be one of these three, *scire fieri* inquiry, or action of debt on judgment suggesting a *devastavit*, in either case if sheriff return *nulla bona* only, or *de bonis propriis* if the sheriff return *nulla bona* and a *devastavit*. Tidd's Pr. *1025, *1114; 1 Saund. 219, note 8; 4 Cow. 445.

In this case it should certainly not be either a *scire fieri* inquiry or an action of debt on judgment suggesting *devastavit*.

It should not be *scire fieri* inquiry (i. e., that a jury should decide for the sheriff whether or not there was a *devastavit*), because this writ was solely for the sheriff's protection, when he did not care to take the risk of returning a *devastavit*, "for the inquisition is for the sheriff's security." 1 Comyn's Dig. 365; 1 Salk. 310; 1 Saund. 219, note 8.

In this case neither the sheriff nor any other officer makes any return at all, but in lieu of that the defendant himself comes into court and with his own lips says in substance, "*Nulla bona* and a *devastavit*," since he has no goods and his pleas confessed and the decree found that he had assets.

The reason for this writ in this case, therefore, is wholly removed and completely taken away, and, "when the reason ceases, the law should cease."

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It should not be action of debt on judgment suggesting *devastavit*, because the defendant cannot in this action plead any defense that he could have pleaded to the original action; he cannot, therefore, plead nor give in evidence want of assets (*plene administravit*). It is therefore, productive of unnecessary delay and expense, since the plaintiff is bound in the end to recover a judgment, *de bonis propriis*, and, as Chief Justice Savage says, the driving of one to such a circuitous and wholly unnecessary proceeding is unreasonable, and it savors of "technical formality rather than substance." 4 Cow. 445; 1 Saund. 219, and cases cited.

But from the facts in this case it should be *de bonis propriis*, because, as no officer makes any return and he practically admits *devastavit*, there can absolutely be no use for a *scire fieri* inquiry.

As he cannot plead or give in evidence "want of assets" in the second action, there is no use for an action of debt on judgment suggesting a *devastavit*. 4 Cow. 445; 1 Saund. 219, notes b and c. This was the most ancient practice and is still the law of to-day when a sheriff sees fit to return *nulla bona* and a *devastavit*. 1 Saund. 219, note 8. And as the defendant himself practically returns *nulla bona* and a *devastavit*, this should be the nature of the execution. Equity acts by analogy to the law and equity follows the law. *De bonis propriis* saves delay and expense.

The above argument is upon the supposition that the bill contains no *devastavit* and that the decree is against the defendant in his representative character, but if the bill does contain a *devastavit*, and we respectfully

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so contend, then all the above may be completely dismissed, for the word "executor" or "administrator" are each words of description or of surplusage, and standing alone and unmodified mean, in a judgment or a decree, a judgment or a decree *de bonis propriis* and not a judgment or a decree of *de bonis testatoris*, but if there be any doubt whatever, a court will always refer to the pleadings to ascertain the true manner in which either was sued. 7 Am. & Eng. Ency. of Law, 378, 404; 6 N. Y. 168; 2 Barb. 370; 37 Iowa, 555; 1 Wis. 36; 24 id. 478; 16 Mass. 528; 2 Ohio, 156; 7 Harr. & J. (Md.) 21.

Upon a return of a sheriff of *nulla bona*, suggesting *devastavit*, the judgment creditor could forthwith order execution *de bonis propriis*, and the Chancellor, by analogy to law, can likewise order execution *de bonis propriis*. 4 Cow. 445; 1 Salk. 310; 1 Saund. 219, note a.

If an executor or administrator admits assets, he thereby becomes personally responsible. 7 Am. & Eng. Ency. of Law, 382, 408; 2 Harr. 211; 5 Myl. & Cr. 63; 56 Ala. 138.

In administration of assets (i. e., payment of debts or legacies), executors or administrators cannot be sued as such in equity, for Chancery has no jurisdiction over them as executors or administrators. It is only by treating them as trustees that it has jurisdiction. 3 Williams on Executors, 588; 2 Story's Eq. Jur., § 1067; 1 id., § 532.

Anthony Higgins, for respondent.

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WOLCOTT, CHANCELLOR.—This case is founded on a bill filed by certain of the legatees under the last will and testament of William Allen, deceased, to recover from James Leach, his administrator, *de bonis non* with the will annexed, their respective legacies or distributive shares of the funds shown to be in his hands by a corrected account on file in the register's office in and for New Castle County.

The bill sets forth the will of the deceased *in extenso*, and the subsequent granting of letters of administration to the respondent in due form of law. It also states that the said administrator afterwards passed two accounts before the said register, to which the parties in interest excepted on the ground of error and fraud on the part of the administrator, and the said accounts were corrected by the Orphans' Court of New Castle County pursuant to the prayers of the exceptants. It also states that by this proceeding the greater portion of the estate, after deducting debts and legitimate expenses, was found to be in the hands of the administrator, whereas the accounts passed by him showed it to be almost entirely extinguished. The bill, by reference to the corrected account and the proceedings in the Orphans' Court that led up to it, are expressly made a part of the complainant's ground of complaint, which show that the moneys represented by the corrected account were lost by the administrator by depositing the same with private banks to his own credit, and which subsequently failed. It is also alleged in the bill that repeated demands had been made upon the respondent for payment and that he had repeatedly refused to comply therewith.

The respondent pleaded the Statute of Limitations,

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laches and a pending right of appeal, but he did not under the rule accompany the pleas with an affidavit that they were not filed for delay, etc., whereupon the solicitors for the complainants moved for a decree *pro confesso* for want of the required affidavit. On the 18th day of February, the motion was granted and a decree entered ordering the payment of the amounts due to the respective complainants according to the prayer of the bill or attachment in thirty days.

At the expiration of the time limited for the performance of the decree, a motion was made for and a rule granted on the respondent to show cause why the decree had not been performed or attachment should not issue, returnable the 25th day of March, A. D. 1895.

Upon the hearing, it appearing that James Leach, though he had valuable real estate, was so embarrassed financially that he could not raise money to satisfy the decree, the court declined to issue a writ of attachment, and thereupon the solicitors for the complainants moved for a writ of sequestration *de bonis propriis*.

The question to be decided now is, whether this writ can issue.

I have not been able to find any reported cases in equity, either in this country or in England, that shed much light on this subject. We are, therefore, compelled to fall back upon general principles as the source of light and guidance in the effort to arrive at a wise and sound conclusion.

The decree now sought to be enforced is a decree against James Leach, administrator, *de bonis non* with the will annexed, of William Allen, deceased. In form it is, therefore, a decree *de bonis testatoris*, and if there

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were tangible assets in his hands sufficient to respond to its requirements, then process appropriate to the enforcement thereof could alone be employed; but if, by reason of a *devastavit* committed by the administrator, there are no available assets in his hands, then recourse may be had to him in his individual capacity. Can it, however, be done in the way proposed? Why not?

It certainly cannot be objected to on the ground that the defendant administrator has not had full opportunity to establish his innocence and the consequent absence of personal responsibility, if he could so do. The bill contained a clear statement of the complainants' ground of complaint, to which he had the right either to make answer or plead. He elected to plead. The result was a decree *pro confesso*, which was equivalent to a confession of his individual liability. Now, in a suit against an executor or administrator, when he has been guilty of neglect or waste, he necessarily appears in a double role, as a defender of himself in both his representative and individual character. If his liability as the representative of the deceased is established, it would be conclusive as to his liability as an individual co-extensive with that as administrator. His liability as an administrator is the exact measure of his liability as an individual. The latter is the concomitant or inevitable result of the former. Liability in either case is ascertained in the same way and by the same degree of proof. The defenses that he may interpose in a suit either against himself as administrator or as an individual, are also the same, and if he fails to make good his defense in a suit against himself as administrator, he will also fail in a suit against himself as an individual when the cause

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of action is the same. Hence, if a decree against an executor or administrator, as such, is sought to be enforced against him by process *de bonis propriis*, because he has wasted the assets of his decedent, he cannot complain that he has not had his day in court, for he has had it just as much so as if a suit had been brought against him as an individual, and a decree entered upon an express allegation of *devastavit*.

Suppose an executor or administrator, in a suit against himself in his representative capacity, sets up the plea of *plene administravit*, and upon issue joined, it is found against him, his liability to the extent of assets found in his hands is fixed, and if they be not forthcoming upon proper demand made, he must answer out of his own property, and there is no plea that he could plead in this or any other tribunal by which he might escape the effect of such finding.

What is the object of our system of pleading and modes of procedure? It is that all parties may be in court, so that each shall have full opportunity to prepare for trial — to present, in a clear and logical form, fully as possible, all the grounds of defense as well as of action. This being done, the end of pleading and of the preliminary or initial process is served or accomplished. Now, if an executor or administrator has had his day in court in both his representative and individual capacity, as has been shown, what good purpose could be served, or how could the ends of justice be better promoted by the institution of another suit or the commencement of a new proceeding with the sole view of fixing his personal responsibility? He could do no more than he has already done. He would be estopped at any stage of its progress

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except as to matters arising subsequent to the entry and enrollment of the decree. He could show in the individual suit only a performance of the decree in whole or in part. An entire performance would be a complete defense, a partial performance would be a defense *pro tanto*.

In this case, the defendant appeared and permitted a decree *pro confesso* to be entered against him, thereby admitting all the allegations contained in the bill to be true. His lips are, therefore, closed. And in any other suit that might be instituted or proceedings begun to establish his personal liability, he would be estopped from denying or even qualifying any of the statements upon which the decree is founded. The facts thus admitted clearly constitute a *devastavit*, and render the administrator liable *de bonis propriis* to the parties entitled under the decree. And if the *devastavit* did not appear by the pleadings, it does by the proof produced at the hearing of the rule to show cause. And whether it appears by the pleadings or by appropriate proceedings subsequent to the decree, it makes no difference. The result is the same. Now, can any substantial reason, in view of what has been said, be assigned why a writ of sequestration shall not issue against the defendant as prayed for? Certainly not. The adoption of such a course can work injury to no man. While it is the policy of the law to guard with scrupulous care the rights and privileges of defendants, yet it does with equal care protect those who have been minors and orphans from the losses and annoyances incident to the delays and shifts which the ingenuity of reckless guardians and administrators have devised to stay the hands of justice.

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Equity disfavors circuitry of action and multiplicity of suits. What it can accomplish directly it will not attempt to do indirectly.

The mode herein outlined of enforcing obedience to a decree obtained against an executor or administrator is very analogous to the common-law mode of executing a judgment against such a party.

Originally if the sheriff return *nulla bona* and also *devastavit* to a *feri facias de bonis testatoris* sued out on a judgment against an executor, it was sometimes the practice of the court to sue out a *capias ad satisfaciendum* against the executor or a *feri facias de bonis propriis*. This practice prevailed in the King's Bench. But it is urged that the decree is against the administrator, and not the individual, and it, therefore, furnishes no authority or basis for the issuance of execution process against him personally. It is interposed as an insuperable objection to the conclusion arrived at; but when viewed in the light of common sense, it resolves itself into a mere refinement which has no foundation either in reason or practice.

The word "administrator" is descriptive, only, of the person who has taken upon himself the responsibility of administering the estate of a deceased person. As to the property of the deceased the administrator stands in his place to dispose of it as the law directs. When the heirs or creditors desire to reach it, it can be done only through himself, and whenever it is found that a *devastavit* has been committed, his own property can alone be reached through the same channel. So that he is the common medium through which his effects and those of the deceased are accessible to the parties

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who are legally interested therein. Therefore the subtle distinctions in which the administrator and the person who bears that title are treated as two separate legal entities, are the mere inventions of astute and ingenious lawyers that embarrass rather than facilitate the attainment of the ends of justice.

Then there is another objection presented equally technical and I might say equally groundless. It was contended, not very earnestly, however, that a *devastavit* having occurred, the jurisdiction of this court ceased after the entry of the decree. That is to say, though a legatee or distributee has a remedy in a court of equity by which to enforce his claim, yet, after decree obtained against the executor or administrator, if it be found that he has wasted the assets and has thereby become personally liable, the decree, so far as being able to realize thereunder, is a nullity. It would in effect be saying to the legatee or distributee that you may pursue your remedy under such circumstances in equity until it culminates in a decree, but you cannot have any execution process through which to enforce its performance. That would in law be a solecism. It would be like a penal statute without a penalty. If such were the law it would make the Court of Chancery a mere accounting office to ascertain the state and amount of the accounts of persons holding fiduciary relations, as the foundation of actions in behalf of their beneficiaries in another forum.

The case of *Wheldale v. Wheldale* in 16 Vesey, Jr., page 376, decided by Sir William Gravel, Master of the Rolls, is an authority in support of this proposition. The question was whether a debt due under a *devastavit*

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was due from the date of the decree or from the commission of the *devastavit*. The facts recited in the case out of which this proceeding grew are very similar to the facts in this case. The suit was instituted by the plaintiff, the residuary legatee named in the will of her grandfather, Thomas Wheldale, against Thomas Wheldale, her uncle, and sole executor of the deceased, praying an account of the testator's personal estate; and that the residue may be secured for the plaintiff's benefit.

The defendant by his answer admitted the probate of the will and stated that, being an officer and chiefly employed abroad, he had left the management of the testator's affairs to John Wheldale, the defendant's brother, and father of the plaintiff, and to testator's friend and confidential adviser; and that he had permitted the said John Wheldale to take certain property valued at £645 8s. 7d, for which the said John Wheldale executed a bond to the defendant. The answer further stated that the said John Wheldale became a bankrupt on the 14th day of July, 1798, and that the defendant proved the bond and received £361 for a dividend under the commission. The defendant did not appear at the hearing of the cause and the plaintiff took a decree for the usual amount, to be ascertained by the master. The Master, by his report, found the facts as stated in the answer, and charged the defendant with the value of the property thus admitted. On further directions, on the 4th of May, 1809, the defendant not appearing, a decree was taken for the sum of £645 8s. 7d. On the 8th day of June, 1809, a writ of execution of this decree was issued; on the 10th of June, 1809, the defendant was charged with an attachment for

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breach of this writ of execution; and on the 20th of June he was brought up by *habeas corpus* and committed to the Fleet, and was afterwards by another *habeas corpus* recommitted to the King's Bench prison, charged with the process of the court. He was finally discharged by the Lord Chancellor because of his bankruptcy. In this case the answer admitted the *devastavit*, and the Master of the Rolls found to be due the plaintiff the admitted value of the wasted property, and a decree was subsequently entered by the Lord Chancellor ordering the payment of the sum thus found to be due, and in execution of which a writ was issued, for breach whereof the defendant was arrested and imprisoned on attachment. It is, therefore, an authority which sustains the view here taken.

But in the Court of Common Pleas it is said that a different practice obtained. That upon a suggestion in the special writ of *feri facias*, of a *devastavit* by the executor, the sheriff was directed to inquire by a jury whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was sued out against him, and unless he made a good defense thereto execution was awarded *de bonis propriis*. It afterwards became the practice of both courts for the sake of expedition, to incorporate the *feri facias* inquiry and *scire facias* into one writ, thence called a *scire feri inquiry*; a name compounded of the first words of the two writs of *scire facias* and *feri facias* and that of inquiry, of which it consists. The writ recites the *feri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nulla bona* by the sheriff, and then suggesting a *devastavit*, commands the

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sheriff to levy the debt and damages of the goods of the testator in the hands of the executor if they could be levied thereof, but, if it should appear to him, by the inquisition of a jury, that the executor had wasted the goods of the testator, then the sheriff is to summon the executor to appear, etc.

The proceeding by *scire facias* on a judgment against the executor was the one recognized and adopted in our act of Assembly, creating and regulating the jurisdiction of justices of the peace in this State. Section 10 of that act, being chapter 99, Revised Code, provides that any judgment before a justice of the peace against an executor or administrator shall be a judgment of assets, to the extent of the assets found to be in his hands either before or after judgment rendered, which, according to law, ought to be applied to the cause of action. It then provides that if execution on such judgment shall be returned unsatisfied for want of assets the plaintiff may sue out a *scire facias* upon a suggestion of waste against the executor or administrator, and if the defendant shall not appear and show sufficient cause to the contrary he shall be deemed guilty of waste and shall be personally liable for the amount of the original judgment; and judgment and execution shall be awarded accordingly as for his own debt. This seems to be very similar to the practice which prevailed in the English Court of Common Pleas prior to the blending of the practice in the Court of Common Pleas and the Court of King's Bench. If we take this as indicative of the practice that might be adopted in the Superior Court of this State, then by analogy, the rule adopted in this case does not widely differ therefrom.

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It may be suggested that the common-law practice in relation to the execution of judgments against executors or administrators *de bonis propriis*, has been supplanted by the remedy afforded to parties interested in estates of deceased persons upon the testamentary or administration bonds required to be taken. But I take it that such remedy is merely cumulative and not substitutional.

In this case a rule to show cause why the decree has not been performed or why an attachment should not issue has accomplished the very same thing that a *scire facias* would, sued out on a judgment against an executor or administrator, obtained before a justice of the peace, namely the ascertainment of the commission of a *derastavit* on the part of the administrator as a condition precedent to the awarding of process *de bonis propriis*. I do not think that it is necessary, however, to lean on the analogy to the law in regard to the practice relating to the execution of judgments against executors or administrators, in order to support the rule laid down in regard to enforcing decrees in this court, against such parties, as the reason adduced is quite sufficient to vindicate its propriety and justice, independently of the practice that prevailed in the common-law court prior to the Revolution and the establishment of the Colonies as independent sovereignties.

Syllabus.

In re Receivership LORD & POLK CHEMICAL CO.

New Castle March Term, 1895.

Act relating to insolvent corporations; Receivers under; Payment of debts under, not according to rank or grade — taxes; No lien on personal property without distress — when equity recognizes diligence in creditors.

1. Equity looks not so much at the form of a debt as to the good faith in which it was made or created. The law recognizes diligence in creditors and gives them a preference according to the rank or grade of their debt; equity, however, imputes no particular merit to diligence unless the advantage thereby acquired amounts to a lien, or some vested right or interest which neither equity nor law will allow to be disturbed.
2. There is no common-law rule which makes the levy and apportionment of the taxes *ex proprio vigore* liens on the property of the taxable. Such liens can only be created by statute. There is no statute in this State declaring real estate taxes to be liens on personal property, without the intervention of some kind of execution process. The only mode, therefore, of reducing them to such liens is by distress.
3. The transfer of a fund from a legal to an equitable jurisdiction will not exempt it from the law of its original jurisdiction.
4. Whenever a statute undertakes to provide for a specific matter or thing already covered by a common-law rule, omissions in its provisions of certain portions of the rule may be taken as indicative of a legislative intent to repeal or abrogate the same. And this, though in all other respects the statute and common law are in exact conformity.

Syllabus — Statement — Argument

5. Under the act relating to insolvent corporations which does not provide for the order in which the debts shall be paid, judgment debts have no precedence over simple contract debts.
6. A receiver appointed under the act relating to insolvent corporations, paid off the real estate taxes out of a fund in his hands arising from the sale of the personal property. A real estate mortgage, being the first lien, was then foreclosed. Held, that an amount equivalent to that paid in taxes should be deducted from the fund applicable to the mortgage, and added to that applicable to a subsequent judgment creditor.

PETITION for the ascertainment of the priority of certain liens.— This case came up on the petition of certain creditors of the Lord & Polk Chemical Company praying for the ascertainment of the priority of certain liens against said Lord & Polk Chemical Company. The facts are sufficiently stated in the opinion of the Chancellor.

J. Biggs, for I. P. Thomas & Son Company.

The judgment creditors of the Lord & Polk Chemical Company can have no preference in this court over simple contract creditors.

All debts in a court of equity stand on an equal footing and should be paid ratably without regard to their form or grade. Rev. Code of Del. (1893), chap. 132, p. 960, § 4; *Horsey et al. v. Stockley et al.*, 4 Del. Ch. 536; *Comly v. Waters et al.*, 2 id. 72; *Newells v. Morgan et al.*, 2 Harr. 225; 1 Story's Eq. Jur., §§ 547, 548, 549, 551, 552; 2 id., §§ 829, 831, 841; *Adams' Eq.*

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252; 5 Am. & Eng. Ency. of Law, 204, 205; Skip v. Harwood, 3 Atk. 564; Lowne v. American Fire Ins. Co., 6 Paige, 482; Guardian Savings Institution v. Bowling Green Savings Bank, 65 Barb. 275; Stockholders of Cochetute Bank v. Colt, 1 Gray, 382; Atlas Bank v. Nahant Bank, 23 Pick. 488; Commonwealth v. Phoenix Bank, 11 Metc. 147.

We claim the item of taxes should be paid out of the real or personal estate, and no portion of it should be taken from the funds arising from the bills receivable, because the bills receivable were in no way liable for the taxes.

Should the Chancellor be of the opinion that the fund now in court should be distributed among the judgment creditors alone, we claim that I. P. Thomas & Son Company should receive their *pro rata* share, because they are judgment creditors, and had their standing in court before the receiver was appointed.

L. C. Vandegrift, for Fruit Growers' National Bank,
and W. M. Byrne, for Ann E. Lord.

We contend that the funds now in the registry of this court are legal, as distinguishable from equitable assets.

The difference is well defined by the following authorities: 1 Story's Eq., §§ 551, 552; Adams' Eq. 252.

Some of the funds being produced by the sale of the personal property coming into the hands of the receiver subject to levy, it is conceded that the levy must be paid out of such funds before they are applicable to any other debts in this case or to the judgment of Ann E.

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Lord. Gluck & Becker, 21; Wiswall v. Sampson, 14 How. 64, conceded by both sides in argument.

If, as we contend, they are legal assets, then in their distribution this court should follow such a distribution as would be made at law. 1 Story's Eq., §§ 551, 552.

The other side, however, contend that there is no provision in the statute for the distribution of the assets of an insolvent corporation when assets are not sufficient to pay all the creditors.

That is true and we are now here to see whether this court, having no statute to guide it, will distribute the funds *pro rata* among all the creditors without regard to their grade; or whether it will recognize those creditors as entitled to priority of payment who have been diligent in reducing their claims to judgments and issuing executions thereon.

Certainly, this receiver had no right to make any preference among creditors. He is merely an officer of the court and his actions are not only presumed to be with the court's approval, but they are subject to review by the court. If he should take it upon himself to distribute this fund and the court upon the application of any creditor should decide he had done it improperly, it would compel him to account to the creditor aggrieved.

It lies entirely within the province of this court to determine how the distribution of the assets of an insolvent corporation in the hands of a receiver shall be made. Edwards' Receivers in Chancery, 104; Gluck & Becker's Receivers of Corporations, 133, 134, 117; High on Receivers, §§ 134, 4.

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The duty to distribute these funds, being thus upon the court, and they being insufficient to pay all creditors in full, the question is, how shall distribution be made?

There is nothing in the statutes to guide the court in the mode of distribution, and there is no practice upon the subject, the question arising now for the first time under this bald act.

When a condition like this confronts the courts of this State they turn to the common law for guidance.

The rule there is that where legal assets (as these are) are to be distributed among creditors and are insufficient to pay all, debts shall have priority of payment according to their respective grades.

The common law recognized a difference in grade between judgment creditors and simple contract creditors. The former were of a higher grade and entitled to priority of payment out of the funds before anything was applicable to the simple contract creditors.

We occupy here the position of judgment creditors and claim that these funds, under the common-law rules, are applicable *pari passu* to our judgments before any part is applicable to the simple contract creditors. Wentworth on Executors, 265, 266 *et seq.*, and notes, 276 *et seq.*; 1 Comyn's Dig. 348, chap. 2; 2 Bacon's Abridg. 433 *et seq.*; Buckland v. Brooks, 1 Cro. Eliz. 315; Littleton v. Hebbins, id. 793; Sawyer v. Mercer, 1 T. R. 691; 2 Williams on Executors, 995 *et seq.*, 102 *et seq.*

Because the policy of the law in this State supports our contention that legal assets will be distributed according to the grade or solemnity of the debt and because

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in the only analogous case which has arisen, viz., that of decedents' estates, the statutes of this State recognize differences in grade.

If Victor Lord had been trading as an individual and Mr. Hoffecker had been his administrator, instead of trading under the name of a corporation with Mr. Hoffecker now winding up his affairs as receiver, there is no doubt that recognition would be given to the different grades of indebtedness and the mode of distribution contended for by us followed.

In stating that this court should follow the common law as to the distribution of these assets, we have depended not upon any statute, decisions or practice of this State, because there seems to be none, but have depended upon what is conceived to be the well-established common-law rule as laid down by the authorities above referred to. That these authorities reach sufficiently far back to be considered common-law principles, we would call the court's attention to *Clawson v. Primrose*, 4 Del. Ch. 643.

The question may be asked whether at the time of the decisions cited from *Croke Elizabeth* there was any Statutes of Distribution, or whether those decisions were made upon what the courts of that day deemed should be the common law, without recourse to statutes.

This would seem to us to be an immaterial inquiry, because in either event those old decisions show what the law of England then was, whether made by men sitting in Parliament or upon the Bench. They show what the controlling spirit of the law then was, whether emanating from Englishmen who sat in one place or the other.

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A creditor having obtained an advantage at law by obtaining a judgment will not be deprived of that advantage even in a court of equity. Story's Eq., § 553; Waring v. Danvers, 1 P. Wms. 297; Newell v. Morgan, 2 Harr. 225.

The policy of this State where the courts are called upon to distribute a fund is to recognize the diligence of creditors as exemplified in the obtaining of judgments.

What is the difference between diligence as against a natural person who has died and an artificial person defunct?

Under our view of the law, the judgment obtained by L. P. Thomas & Son Company does not change its status. That company is still a simple contract creditor, and, therefore, entitled to no part of the fund in court until the judgment creditors are paid in full. Because suit was not commenced until April 22, 1893; and the application for a receiver of this insolvent corporation was made April 19, 1893, on which day a preliminary injunction was issued and all the property and effects of this corporation were from the last-mentioned date *in custodia legis*, the receiver was appointed by the court on April 22, 1893, "with authority to wind up its affairs and do all other things necessary in the premises under the order and direction of this court." Although the above suit was commenced on April 22, 1893, no judgment was obtained until December 20, 1893.

The judgment in this case, not having been obtained until long after the appointment of a receiver, although the suit was commenced possibly before the appointment of a receiver, yet this will not alter the status of

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a claim nor make the creditor a judgment creditor as counter-distinguished from a simple contract creditor. High on Receivers, § 423; Gluck & Becker on Corporations, 23; High on Receivers, §§ 495, 552; Wiswall v. Sampson, 14 How. (U. S.) 52; Walling v. Miller, 108 N. Y. 173.

To show that the above judgment could not possibly be a lien and that it could only take effect from the moment of its rendition, see Rev. Code (1893), § 3, p. 809; Citizens' Loan Association v. Martin, 1 Del. Term, 146.

Our argument thus far has been based on the theory that these funds are legal assets.

Now, suppose the court should consider them equitable assets, then even in that view we are entitled to priority.

Because of our diligence in exhausting our remedies at law and now filing our petitions in this court, we thereby obtain a priority of lien, even in a court of equity. Newell v. Morgan, 2 Harr. 225.

WOLCOTT, CHANCELLOR.—On the 23d day of April, A. D. 1893, John H. Hoffecker, on the application of the Fruit Growers' National Bank of Smyrna, was appointed receiver of the Lord & Polk Chemical Company, a corporation existing under the laws of the State of Delaware, said company at that time being insolvent. Its assets consisted of certain real estate, goods and chattels, and bills receivable or outstanding accounts.

Prior to the appointment of the receiver, certain of the creditors of the debtor corporation obtained liens against it in the following order: A mortgage in favor of the petitioning creditors, embracing all its real estate

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for the real debt of \$10,530, with interest from October 10, 1889; a judgment in favor of the New Castle County National Bank of Odessa, for the real debt of \$6,676.78, upon which there was due \$877.22; another in favor of Ann E. Lord for the real debt of \$3,800, with interest from July 15, 1890; and another in favor of the Fruit Growers' National Bank of Smyrna, assignee, obtained by confession on a judgment bond to which said mortgage is collateral. On these several judgments, executions were issued in the order stated, and levies made on the personal property of the debtor corporation.

There were also tax liens against the corporation which were prior in effect to the liens of the mortgage, and the tax collector shortly after the appointment of the receiver threatened to enforce the payment thereof by legal process if not promptly paid. The receiver paid them out of the funds in his hands derived from the sale of the personal property, upon which the liens of the executions rested.

Subsequently the Fruit Growers' National Bank, after first having obtained the permission of the court, instituted foreclosure proceedings on its mortgage in the Superior Court in and for New Castle County, which resulted in the sale of the mortgaged premises, and the application of the whole of the proceeds thereof to the mortgage debt.

There is another judgment in favor of I. P. Thomas & Son Company, but it was not obtained until after the appointment of the receiver, and, therefore, does not take rank among the judgment or mortgage liens.

The goods of the debtor corporation consisted largely of phosphate material. The receiver deeming it ex-

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pedient to work this raw material up into a commercial fertilizer, and dispose of it in the most ready market at hand, obtained permission of the court so to do and realized out of it and other articles of personal property, the gross sum of \$5,082.33. Out of the remainder of the personal assets, consisting entirely of the outstanding accounts, he collected \$5,792.76.

These two sums, aggregating \$10,875.09, constituted the total assets of the insolvent corporation. On the 6th day of August, A. D. 1894, the receiver passed a first and final account, which showed a net balance in his hands, after deducting all incidental costs, charges and expenses, of \$7,633.01, which he paid into the registry of this court, to be disbursed under the order and direction of the Chancellor. An order was then procured, publication whereof was duly made, requiring all the creditors to prove their claims in court on the 1st day of May, A. D. 1894, so that each one should have the opportunity to be heard as to the manner of distributing the said fund. At the same time, upon the petition of the New Castle County National Bank of Odessa, it having had the first levy on the personal property, an order was granted directing the payment of \$877.22, to it, the amount due on its execution, which left a balance in the registry of \$6,756.79.

The petition on which the receiver obtained leave to pay into court the net balance in his hands, sets forth that the amount of costs and expenses, including taxes, was \$3,242.09, which, being duly apportioned between the two classes of assets and deducted therefrom, would have left \$1,893.18 as the amount applicable to the execution of Ann E. Lord, out of the fund which rep-

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resents the personal property upon which she had the second levy. Barring the taxes paid by the receiver, no objection has been raised as to the amount thus applicable to her execution.

Petitions were filed by the several creditors praying the apportionment of the fund remaining in court according to the very right and equity of the matter.

The first question presented by the facts in this case is: What was the effect of the payment of the real estate taxes out of the money produced by the sale of the personal property, upon which the execution creditors held liens?

These taxes, whether prior or subsequent to the mortgage and judgments, were by statute made paramount liens on the real estate of the debtor corporation from the 1st day of March of each year in which they were respectively levied, for the period of two years thereafter. They were liens at the time of their payment by the receiver.

Not so, however, as to its personalty. There is no common-law rule which makes the levy and apportionment of the taxes *ex proprio vigore* liens on the property of the taxable. Such liens can only be created by statute. There is no statute in this State declaring real estate taxes to be liens on personal property, without the intervention of some kind of execution process.

The only mode, therefore, of reducing them to such liens is by distress. Now the tax collector never having made a legal seizure, either in fact or law, the taxes in question consequently never were liens on the personal property of this corporation. The fact that personal property is made primarily liable for payment of taxes

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does not change or alter the principle. The mere regulation of the order in which several kinds of property shall be taken in payment of the tax demand, possesses no significance whatever in the matter of determining whether they are liens or not.

To admit the primary liability of the personal property for the payment of taxes to be equivalent to the force of liens, would give to every judgment a similar effect, as the plaintiff therein must exhaust the personal property of the defendant before recourse can be had to the real estate to compel the payment of the same. While it is true that a tax is a preferred debt or obligation due from the citizen to the government, yet if the government desires to secure such a preference against individual lien creditors, it must clothe its dues with the force and dignity of a lien or take its chances in the race of diligence.

From what has been said it is manifest that at the time of the appointment of the receiver that the mortgage creditors had a first lien on the real estate subject to the liens of the taxes to the exclusion of all other creditors, and that the execution creditors had liens on the personal property with an equal degree of exclusiveness. These were the conditions that confronted the receiver when he entered upon the duties of his office, yet he appropriated a part of the fund which was held *in custodia legis* for the benefit of the execution creditors to discharge a prior tax incumbrance on the real estate, thus diminishing the value of the security held by them, and correspondingly increasing the value of the special pledge or security held by the mortgagee. If this is permitted to stand or remain unchallenged, then

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so far as the relative positions of these two classes of creditors are concerned, a result will be reached in this court different from that which would have been attained if the legal course of administration had not been interrupted by these proceedings.

Suppose the execution creditors, with the mortgage creditors, had been allowed to pursue their legal remedy to the finish, what would have been the results? The taxes, whose liens had not expired, would have been paid first out of the proceeds of the sale of the realty and the remainder applied to the mortgage debt, and the whole of the proceeds of the sale of the personalty, would have been applied to the execution debts in the order of their priority. Though the collector might have seized the personal property and sold it, yet he would have been bound, if he had done so, to have applied the entire proceeds, less costs, to such executions as were prior to the date of his seizure, and then follow his remedy against the land.

Now the purpose of the act, under which these proceedings were instituted, was not to disturb existing legal rights and priorities — not to shave off of some claims and add to others in order to adjust the complicated affairs of insolvent corporations to ideal standards of right and wrong, but to wind up the business of such concerns in conformity with the rules of equity, one of which is to follow the law where it directs, or where it has determined the relations of rival or contesting creditors.

The receiver, however, alleges as a reason for having paid the real estate taxes out of the personal fund in hand that it was to avoid the seizure and sale of the per-

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sonal property for the taxes, and the confusion and embarrassment to himself and the estate that would probably have followed such a proceeding.

It will not be disputed that he acted in good faith and did what he thought was best. Perhaps it was the wisest course under the circumstances that he could have pursued. But can such considerations as these be interposed to prevent this court from preserving the equities springing out of such conditions by placing the parties concerned in the same positions relatively, with regard to the fund in court, that they occupied with regard to the personal property prior to the appointment of the receiver? Certainly not. I shall, therefore, order the sum agreed upon as applicable to the execution of Ann E. Lord to be increased to the extent it was diminished by the payment of the taxes in question out of any share of the remaining fund that may be apportioned to the Fruit Growers' National Bank of Smyrna, it being the benefited mortgage creditor.

The next question arising out of the facts stated is: How shall the remainder of the fund be distributed?

On the part of the judgment creditors it is contended that their debts, on account of their superior grade, should have precedence over the claims of the simple contract creditors; and on the part of the simple contract creditors, it is contended that all debts in a court of equity stand on an equal footing and should be paid ratably without regard to their form or grade.

It is not disputed that the latter contention is the equitable mode of distributing the assets of an insolvent person or corporation.

But the solicitors for the judgment creditors insist that this fund is a legal asset, whose application is di-

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rected by law from which it cannot be divorced by its removal from a legal to an equitable jurisdiction. There can be no question that this fund is a legal asset, and if it be true that the law does recognize such a preference, there is an end of all controversy, so far as the simple contract creditors are concerned, for it is certain that the mere fact of its transfer from the one jurisdiction to the other will not exempt it from the operation of the law of its original jurisdiction. The rule governing its apportionment, or distribution, at law would still cling to it as effectually as if it were being administered in a legal tribunal.

But is there such a law? If not, then there is nothing to hinder or restrain the operation of the principle that "equality is equity." Let us see. All the authorities cited by the solicitors for the judgment creditors upon this point, refer to the common-law rule regulating the distribution of the assets of insolvent decedents' estates.

But that rule is not in force in this State, because it has been superseded by the provisions of our own statute in relation to the same subject. Although our statute and the common law may agree in many particulars, yet that fact does not give them concurrent authority — the one must be treated not as a supplement to, but as an entire substitute for the other. Wherein the statute and the common law agree or differ touching a distinct subject, the statute must prevail. Also, if the Legislature undertakes to provide for the regulation of human conduct in respect to a specific matter or thing already covered by the common law, and parts of which are omitted from the statute, such omissions may be taken generally as evidences of the legislative intent to

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repeal or abrogate the same. Take for example our own Statute of Frauds. It does not contain some of the provisions of the English statute, but the omitted portions thereof, for the reasons before stated, have never been held to be in force in this State, since the enactment of our own statute.

Now, if our mode of distributing the assets of deceased persons is to control the apportionment of the fund representing the outstanding accounts of the debtor corporation, we must look to our own statute, and not to the common law, as the source of our guidance and direction.

At this point another inquiry arises. Do the provisions of our statute apply? Surely not. If the fund in controversy had been brought into this court by an executor or administrator, on a creditor's bill or in some other way, it would have to be distributed according to the directions of our own statute, which does prefer judgment over simple contract creditors. But it was not brought here by such an officer. It was deposited in the registry of this court by the receiver of the Lord & Polk Chemical Company, who was appointed under an act which relates exclusively to insolvent corporations and which does not prescribe the order in which its debts shall be paid.

The analogy between the duties of this receiver and the duties of an assignee under a voluntary assignment in bankruptcy, is certainly more striking than the analogy between his duties and those of an administrator.

And if we are to look for a rule outside of the principle of equity to regulate the distribution of funds like that with which we are now dealing, and as to which our Code is absolutely silent, we might turn with more favor

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to the provision of our insolvent act relating to voluntary assignments which directs a *pro rata* distribution of the assets of the assignee among all his creditors, than we could to the statute in regard to the settlement of personal estates. Why? Because the conditions are more nearly alike and the modes of distributing assets the same. But however complete the likeness or analogy in these respects we cannot call to our aid this statute in solving the problem involved in the apportionment of this fund.

In such cases we must be guided in our determinations by the rules of equity.

When the Legislature authorized the Chancellor, upon the application of a stockholder or creditor of an insolvent corporation, to appoint a receiver therefor without any directions as to his duties, or as to the distribution of its assets, it was their intention, no doubt, that the mode of winding up the business affairs of such institutions would be the one that is recognized and acted on in a court of equity in similar cases.

Certainly in the absence of a statutory provision adopting a different mode, the equitable one would obtain.

The maxim "equality is equity" is very much favored in this court, and whenever the circumstances arise to justify its application, it is never reluctant to give the desired relief. Why should one creditor, irrespective of the form or grade of his debt, be entitled to any more consideration than another? The law makes a distinction, it is true, but equity looks not so much at the form of a debt as to the good faith in which it was made or created. What matters it whether a debt is evidenced by a bond or due bill, by a note or book account, the obligation or duty to pay it is just the same. And it is

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this principle that a court of equity takes into account, in putting debts of all grades upon the same common level. I know it is urged that those who have procured the higher evidences of indebtedness are considered as having displayed greater diligence and as a reward therefor the law gives them a preference according to the rank or grade of the debt. Equity, however, imputes no particular merit to diligence unless the advantage thereby acquired amounts to a lien or some vested right or interest which neither equity nor law will allow to be disturbed.

A paragraph from Pomeroy's admirable treatise on "Equity Jurisprudence" is very instructive on this point. He says: "Another remarkable and most just application of the principle," referring to the maxim "equality is equity," "often leading to results very different from those produced by the operation of legal rules, may be seen in all those instances where a court of equity acquires jurisdiction from any cause to wind up, distribute or settle an estate, property or fund against which there are a number of separate claimants. One example is that of settling the affairs of an insolvent partnership, corporation or individual debtor in a creditor's suit brought by one on behalf of all other creditors, where the assets are not sufficient to satisfy all demands in full; the court always proceeds on the principle that 'equality is equity,' and of apportioning the property *pro rata* among all the creditors."

This is a very broad statement of the principle and must be taken subject to the limitations embraced in other fundamental maxims and principles equally clear and imperative, in their application previously alluded to in other parts of this opinion.

Syllabus — Statement.

THOMAS S. LAMBLEN and HARVEY LAMBLEN v. SAMUEL
B. WEST and MARY J. WEST.

Sussex March Term, 1895.

Wills — construction of; Rights of beneficiaries fixed at time of testator's decease, and not altered by subsequent acts; Conditions precedent and subsequent in; Bequest of profits rising from a contract, defeated by abandonment of contract after testator's decease.

1. The conditions which existed at the time of the testator's death must be regarded as existing now, as the status of the parties under the will was fixed at the moment of his decease.
2. The testator, prior to his decease, entered into a contract with certain persons, by which the latter were to go upon his land and cut and saw the timber thereon, and to receive a compensation part in money and part in wood. The contract was in process of performance when the testator made his will in which he devised the land in fee to M. J. W. "Provided, however, that all the timber on the aforesaid land shall be worked as per contract now existing, and the rising issues therefrom shall be paid into my estate and be equally divided among my lawful heirs." Shortly after testator's decease, the contract was abandoned by the contractees, who were totally insolvent. Held, that M. J. W., by the abandonment, was entitled, under the devise of the fee in the land, to all the timber as well.

INJUNCTION BILL.— The facts are fully set forth in the first portion of the opinion of the Chancellor.

Argument for complainant.

A. Higgins, for complainants.

Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise, or whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed; the owner of the fund, or the contracting parties, may make land money, or money land. *Fletcher v. Ashburner*, 1 Bro. C. C. 497, per Sir Thomas Sewall; S. C., 1 Eq. L. C. 826, 971; 1 Pom. Eq. Jur., §§ 371, 372; *Sharpley v. Fernwood's Executor*, 4 Harr. 336.

"Equity looks to the intent rather than to the form." "In fact, it is only by looking at the intent rather than at the form, that equity is able to treat that as done which in good conscience ought to be done." 1 Pom. Eq. Jur., § 378. Hence, in this case, the Gault contract for the sale to the Gaults by the testator of the woodleaf comes under the operation of the principle as much as if it had been a contract for the sale of the fee of the land.

The contract between the testator and Gault operated as an equitable conversion of the timber, and its interests from the time of its execution. By it Robert Lambden became the trustee of the timber for the Gaults, and they became trustees of the purchase money for Lamb-

Argument for complainant.

den. 3 Pom. Eq. Jur., § 1161; 1 id., § 368; Green v. Smith, 1 Atk. 572; Pollexfen v. Moore, 3 id. 272; Atcherly v. Vernon, 10 Mod. 518.

In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser. 3 Pom. Eq. Jur., § 1161.

“If the contract” (to sell lands) “is made upon an actual valuable consideration, and complies in other respects with the requisites prescribed by equity, then, as soon as it is executed and delivered, the vendee acquires an equitable estate in the land, subject simply to a lien in favor of the seller as security for payment of the price, while the vendor becomes the equitable owner of the purchase money.” 4 Pom. Eq. Jur., § 372.

It has been held in respect of a purchaser (*e. g.*, the Gaults in this case), that, where the purchaser, at the time of his death, was under a contract to purchase realty, which then might have been specifically enforced against him, the right of his real representative was not affected by anything which took place subsequently. Fletcher v. Ashburnam, 1 Lead. Cas. in Eq. 843, 986.

Thus, if the contract was rescinded by the vendor on the ground of delay, or, under a power reserved to him in the contract, the real representative of the purchaser was entitled to receive the purchase money out of his personal estate. Whitaker v. Whitaker, 4 Bro. C. C. 31; Hudson v. Cooke, 13 L. R. Eq. 417.

If he could not be compelled to take the estate, the heir cannot insist on improving it, and that the personal estate shall pay for it.

Argument for complainant.

A devisee is not to be more favored than a particular legatee.

The distinction is between cases where property is devised, charged with the payment of a sum of money, and those cases where there is an exception from the devise. If the original destination of such sums has failed, by lapse or otherwise, the question then arises whether such sums result to the heir-at-law of the testator or sink into the land for the benefit of the devisee. 1 Wh. & T. L. C. 896.

“If a devise to a particular person or for a particular purpose be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure.” *Cooke v. Stationers Co.*, 3 Myl. & Cr. 264.

There can be no doubt here that the proviso as to the timber constitutes an exception out of the devise to Mrs. West of the fee, and not a charge upon it.

The bequest is in the form of a proviso. The fee is first and explicitly devised, and then the issues arising from the timber under the Gault contract are excepted, and carved out of it. It is the bequest of the right to the timber growing on the land. It is not the bequest of money charged upon it. The timber and its issues are cut out from the fee and bequeathed to other objects.

It is made the distinct subject of this bequest. It is something taken from the devisee of the fee and given to the heirs.

Argument for complainant.

Independently of the residuary clause of the will, the heirs-at-law are entitled to the timber (if the bequest of the timber be held to lapse because of the nonperformance of the Gault contract), because, by the proviso, the testator has carved a chattel interest out of the fee of the estate devised to his daughter.

When a testator carves a chattel interest out of his real estate, and makes it the subject of limitations which fail, it results to his heirs, but with the character which the testator impressed upon it. *Burley v. Evelyn*, 16 Sim. 290, 295; *Cook v. The Stationers Co.*, 3 Myl. & Cr. 264; *Wright v. Horne*, 8 Mod. 222; *Gravenor v. Hallum*, Amb. 643; *Ackroyd v. Smithson*, 1 Wh. & T. L. C. in Eq. 896, 898.

The timber will go to the three children of the testator under the residuary clause, being item 15 of the will, when taken in connection with the proviso of item 4, directing the timber to be turned into personalty.

While it may be the rule that a mere direction to sell land for a particular purpose is not such an indication of a testator's intention to convert real into personal property, to all intents, so that the undisposed of proceeds should pass under a residuary bequest of personalty, yet, where a testator expressly declares that the money arising from the sale of real estate shall be considered as part of the personalty, it will pass under a general residuary bequest of personalty in the same will. *Ackroyd v. Smithson*, 1 Wh. & T. L. C. 900, 901; *Kidney v. Coussmaker*, 1 Ves. Jr. 436; *Collins v. Wake-man*, 2 id. 683; *Robinson v. The Governors of London*

Argument for complainant.

Hospital, 10 Hare, 19, 27; Bright v. Larcher, 3 DeG. & J. 156; Field v. Pickett, 29 Beav. 568.

So, also, the intention that the proceeds of the sale of real estate should pass under a residuary bequest of personal estate may be inferred from expressions in the will irresistibly leading to such a conclusion; and the blending of the real with the personal estate has been considered as furnishing an indication of such intention. Ackroyd v. Smithson, 1 Wh. & T. L. C. 901; Byam v. Munton, 1 Russ. & My. 503; Mallabar v. Mallabar, Cas. temp. Talbot, 78; Brown v. Bigg, 7 Ves. 280; Griffiths v. Pruett, 11 Sim. 202; Bromley v. Wright, 7 Hare, 334.

But if the proceeds of this timber do not pass to the three children as residuary legatees, it is because it will go to them as heirs-at-law. In no case can it go to the devisee of the farm. Ackroyd v. Smithson (notes), 1 Wh. & T. L. C. 902, 903, and cases cited; Amphlett v. Parke, 2 Russ. & My. 221, 227, 231; Harker v. Reilly, 4 Del. Ch. 81-88; State v. Wiltbanks, Administrator, 2 Harr. 18-23; State v. West's Executor, id. 151.

A lapsed bequest of real property goes to the heir-at-law; a void one to the residuary devisee. Ferguson's Lessee v. Hedge, 1 Harr. 524.

Even if the legacy of the woodleaf should be held to have lapsed because of the failure of the Gaults to carry out the terms of the contract, the proceeds of the wood will go to *all* the children either as (1) heirs-at-law, or (2) as devisees or legatees under the residuary clause of the will.

Argument for complainant.

In either case, it will not go to Mrs. West, the devisee of the fee, and the only question which has been the subject of contention is whether it should go to the heir or the residuary legatee where they happen to be different and not the same persons.

A devise of this woodleaf is to be inferred when the profits are devised; or the income being devised, the *corpus* is devised. Shepperdson v. Tower, 1 Y. & C. M. C. C. 441; 6 Jur. 658; Lorton v. Woodward, 5 Del. Ch. 505; Spring v. Stephenson, 1 Ir. Ch. 132.

A direction to raise legacies out of the rents and profits of real estate is a charge on the estate itself. Londesborough v. Somerville, 19 Beav. 295; Green v. Belchier, 1 Atk. 505; Dickin v. Barker, 14 L. J. (N. S.) Ch. 22; 8 Jur. 1098; 1 Sim. & S. 489; 4 Ves. Jr. 51.

The clause in item 4 of the will, beginning, "Provided, however, that all the timber," etc., is not a condition but a limitation, limiting the devise of Mary J. West, *i. e.*, that she takes the estate subject to the wood being cut off. Roper on Legacies, vol. 1, p. 500.

"A legacy upon condition is defined to be a bequest whose existence depends upon the happening or not happening of some *uncertain* event, by which it is either to take place or be defeated;" and again, "in cases of wills where the intention can be collected that the bequest should be conditional, that intent will be effectuated by whatever words expressed."

If, therefore, this proviso is construed to be a limitation, the estate taken by Mary J. West is subject to it,

Argument for complainant — Argument for defendant.

and the nonperformance of the contract cannot operate in favor of the devisee.

If the proviso in item 4 of the will should be construed to be a condition, it is a condition precedent and not a condition subsequent. 1 Roper on Legacies, 501, 502, 513. See also chapter entitled "Legacies upon Condition."

As to conditions subsequent, see *Simpson v. Vickers*, 14 Ves. Jr. 340, and cases cited; *Egerton v. Earl Brownlow*, House of Lords Cases, vol. 4, p. 1; *Popham v. Bampffield*, 1 Vern. Ch. 82; *Hayden v. Stoughton*, 5 Pick. 531, and cases cited; *Gravenor v. Hallum*, Amb. 645; *Brigham v. Shattuck*, 10 Pick 308, 309.

If, again, the proviso should be construed to be a condition, it must be a condition precedent, and the devisee takes the estate subject to the condition, and in no event can she take advantage of the nonperformance of the contract.

C. W. Cullen, for respondent.

The proviso in item 4 of the will did not amount to a reservation of the timber so as to exclude it from passing, as part of the land, but only to subject it to be worked under and in conformity with the contract.

The devise of the testator in said proviso to those whom he designated as his heirs-at-law, was the avails arising from the contract as and to be performed by the Gaults, and conferred upon each legatee only such fruits as were secured by the contemplated performance of the contract, but gave them no right to or in the land or the timber thereon, except only as subjecting it to be cut and worked in executing the contract.

Argument for defendant.

That the gift of the testator was upon the express declaration that the timber "should be worked as per contract now existing, and the rising issues therefrom should be paid into my estate." This amounted to a gift of the proceeds of that contract and of those only. Whatever was devised from the working of the timber under that contract, and that only, was to go into his estate, and unless such timber was worked under the contract to which he especially refers, there could be no issues therefrom as devised from such working.

The gift of the testator was of his interest in the contract, and, therefore, only the avails of this contract as worked by the other parties (the Gaults) or the damages which ought to be recovered from the Gaults for the failure to perform the contract, would be issues arising therefrom, and this only was to be paid into his estate and be equally divided among his lawful heirs.

As admitted, and not denied, the Gaults were unable, by reason of insolvency, to perform the contract, and hence there was no rising issues therefrom, which passed under said devise. In all other respects except only as to the right and duty of the Gaults to work the timber (as per contract), then existing, his daughter Mary, as devisee, took the lands in fee-simple and no other person than the one having the right to cut the timber in execution of that contract can claim anything against her. The estate devised at once vested in Mrs. West, and the condition or lien to which it may be likened was subsequent and not precedent. Equity will relieve in cases of a condition precedent, but not subsequent. 6 Pet. (U. S.) 145; 1 Jarman on Wills, top paging, 690; 2 Story's Eq. Jur., paragraphs 1302-1307; 4 Kent's Com. top paging, 125-131; 2 Bl. Com., top paging, 156; 10

Argument for defendant.

Pick., Merrill Adm. in Levy Ext. 507; 1 Fonblanque's Eq., top paging, 211, note C; Aislabic v. Rice, 3 Maddox, 137.

The contract in this case was executed by R. Lambden of the one part, and the Gaults of the second part; the same was not carried out by reason of the insolvency of the Gaults, and they not only refused to execute their part, but were unable to do so from their insolvency. The execution of the contract by the Gaults, one of the parties, became impossible. In such cases the devisee takes the lands divested of the condition. 4 Kent's Com. 130; 2 Bl. Com. 157; 1 Fonblanque's Eq., note C, 211.

The contract was between and executed by R. Lambden and the Gaults, and by the same a legal liability to execute and perform the provisions thereof was created by and binding on both parties. A failure by either to comply made him liable in damages for a breach of contract which was cognizable in a court of law and not equity; the fact that the Gaults were insolvent in no way can change or affect the proper jurisdiction of the parties in this case; in other words, the only remedy in this case is a legal right vested now in these executors of Robert Lambden to proceed in an action of debt on said contract against the Gaults for damages by reason of failure on their part to perform the covenants set forth in said contract to be kept and performed on their part. The remedy in this case is a legal one and not in equity; when there is a legal remedy a court of equity has no jurisdiction. Suppose Lambden had in his lifetime, on his part, done some act to prevent the Gaults performing their part of said agreement, was not the only remedy

Argument for defendant.

they had to sue him for a breach of the contract on his part? This devise was not made a charge upon the lands, nor can the same be so construed, but was a devise to the heirs of the "rising issues," made and realized from the working of the timber on said lands under said contract; it was a devise of the proceeds to be realized in the future from a contract which afterwards was repudiated and utterly failed by the acts of one of the parties, the Gaults. Here then was a devise of the profits to be realized subsequently from cutting timber on lands devised under a contract which utterly failed, and became null and void. The foregoing position is supported by authorities relative to the construction of wills, and they will show that in such cases, where the title vests, and is subject to a condition subsequent, which ceased by the act of God, utter inconsistency, impossibility to be performed, or by the act of either party, etc., the devisee takes the estate divested of the condition. R. Lambden died in April, 1885; the Gaults repudiated contract or rather became utterly unable to carry out the same some six or eight weeks after Lambden's death; and after a delay until January, 1889, when it was rendered certain that the Gaults would not, and by reason of insolvency could not, perform the contract, and had long before removed the mill from the premises, rendering impossible the performance of the contract on their part, the said devisee took possession of said lands and proceeded to cut timber off with reference to clearing and putting lands in cultivation. This performance of the contract having become impossible on the part of the Gaults, is there any legal or equitable right by which the devisee could have or compel a speci-

Argument for defendant — Opinion.

fied performance of the same, and does it not come to this — in case of a breach of a contract such as this — the only remedy is by action at law to recover damages for a breach of the same?

WOLCOTT, CHANCELLOR.— The facts in this case are substantially as follows: On the 20th day of October, A. D. 1883, Samuel H. Gault and Silas Gault, of Broad Creek Hundred, Sussex county, State of Delaware, of the one part, and Robert Lambden, of the other part, made and executed a certain agreement in writing, as follows:

“ This agreement made and concluded by and between Samuel H. Gault and Silas Gault of Broad Creek Hundred, Sussex County, and State of Delaware, of the first part, and Robert Lambden of the same place of the second part;

“ WITNESSETH, That the said Samuel H. Gault and Silas Gault, for and in consideration of the stipulations hereinafter set forth, Hath agreed to and with the said Robert Lambden, his heirs or assigns, to erect a steam saw mill on land of said Robert Lambden on what is known as Ross Point, lying between the Big and little Melson's Mills, in Broad Creek Hundred and County aforesaid, and said mill to be kept at said location until all the timber large enough is sawed up, the said Gaults are to saw the timber into peach crate patterns at the rate of one hundred thousand annually or more if they chose, they are to cut, haul and saw said timber and to have the one half part of the same after it is sawed into patterns. All lumber sawed not peach box patterns, for

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said Lambden, they are to have, for what pine timber under one inch in thickness sixteen cents per hundreded feet mill measure. All pine lumber sawed (except peach box patterns) one inch in thickness or over, twenty cents per hundred feet mill measure. All white oak and Hickory sawed to have twenty five cents per hundreded feet. They are to saw all lumber in good merchantable order with as little waste as possible. The said Robert Lambden is to haul free of charge the said mill and machinery from its present position to the point where she is to be located on Ross Point, as aforesaid, to furnish also free of charge enough timber out of which said Gaults can saw lumber for the mill-house, said mill-house to be put up at the said Gaults expense. The said Lambden is to furnish the other parties a dwelling house to live in free of rent during the time they let the mill remain on Ross Point and while engaged in working said Lambden's timber. The said Robert Lambden is to furnish the said Gaults two timber carts and his Laura mule to use free of charge during the time said Gaults are sawing his timber at Ross Point.

"Witness the hands and seals of the parties hereto this twentieth day of October, A. D. 1883.

(Signed.) SAMUEL H. GAULT, [SEAL.]

(Signed.) SILAS T. GAULT, [SEAL.]

(Signed.) ROBT. LAMB DEN. [SEAL.]

Attest:

(Signed.) THOMAS W. RALPH."

That the said Robert Lambden departed this life on or about the 20th day of April, A. D. 1885, leaving to survive him as his heirs-at-law and next of kin, three chil-

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dren, to-wit, the complainants, Thomas S. Lambden and Harvey Lambden, and the defendant Mary J. West, who intermarried with, and is now the wife of, Samuel B. West, the other defendant.

That the said Robert Lambden being seized in fee simple in his lifetime and at the time of his death, of the tract of land hereinafter described, being the same tract mentioned in the said contract above quoted, made and published his last will and testament bearing date the 10th day of April, A. D. 1885, and which was duly proved and allowed on the 29th day of April, A. D. 1885, by the register of wills of said county, and recorded in Will Record Book P, No. 15, page 112. Letters testamentary thereon were duly granted to the said complainant Thomas Lambden and the said defendant Samuel B. West, the executors named in said will.

Items 4 and 15 of said will, being the only parts involved in this controversy, are as follows:

“Item 4th. I give and bequeath unto my daughter Mary J. West, wife of Samuel B. West, to her and to her heirs and assigns, to have and to hold forever, a certain tract of land situated in Broad Creek Hundred Sussex County, the same being all the land south of the public road leading from the Big Mill to the Little Mill, including all the land between the aforesaid Mill streams and containing about one hundred and ninety acres (190), Provided, however, that all the timber on the aforesaid 190 acres shall be worked as per contract now existing, and the rising issues therefrom shall be paid into my estate and be equally divided among my lawful heirs.”

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“Item 15th. I give and bequeath all the rest, residue and remainder of my personal property not heretofore disposed of unto my three children, viz.: Thomas S. Lambden, Harvey Lambden and Mary J. West, the same to be equally divided among them.”

Prior to the death of the said Robert Lambden, the testator, the said Samuel S. Gault and Silas Gault, in pursuance of the said agreement, erected a sawmill on the tract of land in question, and proceeded to carry out the terms of the said agreement during the remainder of the said Robert Lambden's life, and for a few months after his death when, on account of insolvency, they abandoned the work, and utterly failed and refused to complete the execution of the said agreement.

That in the month of January, A. D. 1889, the said Mary J. West, under said item 4 of said will, took possession of the said lands so devised to her, and directed the said Samuel B. West, her husband, to clear up said land with a view to putting the same under cultivation.

That on the 20th day of June, A. D. 1889, the complainants claiming the timber upon said land under item 4 of said will, as heirs-at-law of the said testator, filed a bill setting forth substantially the above-stated facts, and praying for an injunction restraining the said defendants from cutting the said timber; and thereupon a rule was issued to show cause why a preliminary injunction should not issue, returnable the 8th day of July, A. D. 1889, and an order was issued restraining them in the meantime, as prayed for.

On the 8th day of July, A. D. 1889, the defendants executed a bond with J. Gibson Cannon, as surety, conditioned that the said Mary J. West should keep a just

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and true account of all the timber that might be cut, converted and sold by her growing on the land devised to her as aforesaid, and pay the proceeds of the sale thereof to the executors of said deceased, provided, that the decree finally establishing the rights of the respective parties shall so direct, and that the said Mary J. West, her heirs, executors or administrators shall, in all things, perform and abide such decrees or orders as the Chancellor may make, then the said bond to be void; otherwise to be and remain in full force and virtue, whereupon the restraining order was discharged.

On the 30th day of July, A. D. 1890, Mary J. West, one of the defendants, filed an answer, admitting to be true all the facts stated in the bill of complaint, with the additional allegation that Robert J. Lambden in his lifetime, received the proceeds which arose from the said agreement with the said Gaults up to the time of his death, and the proceeds which arose therefrom subsequent to his death passed into the hands of his executors.

The controversy in this case arises between the complainants and the defendant Mary J. West, under the provisional clause in item fourth of the said will, by reason of the abandonment by the Gaults of the contract therein referred to.

It is proper at the threshold of the consideration of this question to eliminate therefrom the fact that the timber growing on the land devised was converted into money by Mary J. West, the devisee of the land, under the sanction of this court, and the same secured by a bond to await the adjudication of the rights of the parties. The conditions which existed at the time of the testator's death must, for the purposes of this case, be regarded as

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existing now, as the status of the parties under the will was fixed at the moment of his decease. This court cannot create a condition unauthorized by the will, whether intentional or otherwise, by which a certain result may be attained compatible with either a supposed or real testamentary intent.

It was insisted by the solicitors for the complainants that the contract between the testator and the Gaults operated as an equitable conversion of the timber growing on the land devised to Mary J. West, from the time of its execution.

The determination of this question thus raised depends upon the purport and object of the contract. By that contract, the Gaults covenanted with the testator to erect a sawmill on Ross Point being on the lands devised in the said fourth item of the will to the said Mary J. West, and to keep the same there until all the timber large enough was sawed up, and to saw the said timber into peach-crate patterns at the rate of 100,000 annually, or more if they chose. For this they were to receive one-half, after being sawed into such patterns. All lumber sawed, not being peach-box patterns, they were to saw for Lambden, the testator, at prices specified in the contract.

It is manifest upon the reading of this contract that its effect is nothing more nor less than a simple hiring or employment of the Gaults by Lambden, the testator, to cut and saw the timber in question, to be paid for by him part in money and in part in kind. There is nothing whatever in its language to support the contention that it is a contract for purchase or sale of the timber, or any interest in the land.

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It was further contended, on the part of the complainant, that the provision in the said fourth item of the will, by which the testator declared that the timber growing on the land devised to Mary J. West should be worked according to contract (referring to the agreement with the Gaults), and bequeathed the proceeds arising therefrom to his heirs-at-law, was a condition precedent annexed to the gift of the fee in the land.

This contention, however, must also fall from the fact that this provision in the will is in reality neither a condition precedent nor subsequent, as regards the devise of the land to Mary J. West. The vesting of the fee in Mary J. West did not in anywise depend upon the performance or nonperformance of the agreement. It was absolutely free from any contingency whatever. Immediately upon the death of the testator, her right in the land became definitely fixed or established. It is not a condition subsequent, because there is no intimation in the will that her estate in the land should be defeasible upon the happening or not happening of any particular event.

The only condition contained in item fourth of the will relates exclusively to the bequest to the heirs-at-law of the issues arising from the contract in regard to the cutting of the timber. After devising the fee in the land to Mary J. West, the testator provides, "that all the timber on the aforesaid 190 acres shall be worked as per contract now existing and the rising issues therefrom shall be paid into my estate and be equally divided among my lawful heirs."

This language cannot be misunderstood. It is only the issues arising from the contract with the Gaults that

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he gives to his heirs-at-law. He does not give them the timber, neither does he authorize the executors to sell the timber and give them the proceeds of the sale thereof; they take no interest whatever in the timber except in the particular mode designated in item fourth of the will, and no authority is conferred upon the executors to do any act concerning the timber except to receive the issues arising from the contract and to distribute the same among the heirs-at-law. The simple language employed by the testator to give to Mary J. West the fee in the land, invested her with absolute dominion and control over it and all the timber growing thereon. Her authority in respect thereto was limited only by the provisional clause in item fourth, which subjected the timber to the operation of the contract therein referred to. That agreement gave to the Gaults only the right to occupy the land for the purpose of working up the timber in the manner provided for in the contract. The right of Mary J. West to enter the land and use it for her own exclusive purposes was perfect against all the world except the Gaults. As we have seen, the executors had no right to enter, and the heirs-at-law are in the same position. It is urged that the provisional clause in item fourth of the will must be construed so as to have the effect of an exception of the timber from the gift to Mary J. West. Suppose it is, its operation was made by the testator to depend upon the will of the Gaults. I have no doubt that it was an exception subject to the contingency involved in the performance of the contract, through which the exception might be realized by the heirs-at-law of the testator.

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By the insolvency of the Gaults, however, and their refusal to perform the contract mentioned, the only mode thus expressly provided by the testator by which his heirs were to receive any benefit under item fourth, has been rendered totally ineffective. The heirs-at-law cannot now, therefore, take anything under the fourth item of the will, unless it be in some way contrary to the testamentary method. This court has no power to provide such a way. It is certain that it has no power to make a new will for the testator, and it is equally certain that it has no power to substitute a new provision in a will. For the power to do the latter would argue the existence of the power to do the former.

Suppose that the testator had intended that his heirs-at-law should have the benefits of the conversion of the timber into personalty, in the way prescribed in the will, or of that which was equivalent thereto, he should not have restricted them to a particular mode of receiving such benefits. Having made the gift dependent upon the performance of the contract, must not they look to that as the only source whence such advantage must be derived? He, therefore, made the performance of the contract a condition upon which his heirs-at-law should enjoy the benefit of this peculiar bequest.

In the construction of this clause of the will, it is immaterial what the conjectural intention of the testator may have been. Whether or not he intended that his heirs-at-law should have the profits of the timber independently of any possible failure or abandonment of the contract cannot prevail against the unambiguous language which he used, not only to express his intention,

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but to carry it into effect. If he did so intend, it was simply a case of *voluit sed non dixit*.

I am, therefore, of the opinion that Mary J. West, after the abandonment of the contract by the Gaults, took the land devised to her in item fourth of the will, and all the timber growing thereon, discharged from any claim thereto on the part of the heirs-at-law of the testator or of his executors.

Syllabus.

JEHU L. ALLEN v. THEODORE STEWART and PAUL GILLES, Sheriff of New Castle County.

New Castle, September Term, 1906.

Injunctions — corporations — transfer of stock; Statutes — construction of.

1. The provisions of section 18, chapter 147, volume 17, Delaware Laws, Revised Code, 576, that "the shares of stock in every corporation in this State shall be deemed personal property, and shall be transferable on the books of the corporation in such manner as the by-laws shall provide, and whenever any transfer of shares shall be made for collateral security, and not absolutely, the same shall be so expressed in the entry of such transfer," does not make an assignment on the books of the corporation necessary to vest title in a transferee of shares of stock.
2. An assignment on the books of a corporation is not necessary in order to vest title in the transferee of shares of stock, either in the case where the by-laws of the corporation are silent upon transfers, or in the case where its by-laws do define a mode for such transfer, *unless* the charter or some general law expressly requires an assignment on the books.
3. The provisions of the by-laws of a corporation defining a mode of transferring shares of stock, do not exclude all other modes, unless the charter, or some general law, negatives any other mode of transfer.
4. In the absence of any statutory provision, or of a by-law upon the subject, shares of stock in a corporation are transferable as any chose in action, and like them, the transfers of stock may be either legal or equitable.

Syllabus — Statement.

5. The books of a corporation are private. They are not public records, open to the inspection either of the public or a creditor of one of the stockholders.
6. C. W. E., who was president of the J. P. Co., being indebted to complainant, gave him a bond, and assigned, as collateral security, 200 shares of stock in said company and a policy of insurance. Coupled with such assignment was a written agreement between them, that complainant would not interfere with the management of the said company, would retransfer a certain part of said stock upon payment of a certain part of said indebtedness, or would retransfer the whole of said stock upon payment of the whole of said indebtedness; but that on failure of the conditions of said bond, or to keep up said insurance policy, said assignment of the stock and the policy should become absolute. The transfer of said stock was not made on the books of said company, but notice of the transfer was served on C. W. E. as its president. The charter and the by-laws of the company were entirely silent as to the transfer or assignment of shares of stock. Subsequently, T. S., one of the defendants, recovered a judgment against C. W. E., issued a *fi. fa.*, with clause of attachment, and attached said 200 shares of stock, and advertised same for sale. On bill to enjoin the sale of said stock by T. S., held, that it was not necessary that the shares should be transferred on the books of the company, and that the injunction should be granted.

INJUNCTION BILL.—Bill filed by Jehu L. Allen against Theodore Stewart, and Paul Gilles, sheriff of New Castle County, to restrain them from selling 200 shares of stock of the Journal Printing Company, a corporation existing in this State, under *fi. fa.* attachment against Charles William Edwards.

Argument for complainant.

Harry Emmons, for complainant.

Shares of stock in an incorporated company which have been transferred by an assignment executed by the holder and by a delivery of the stock certificates, with a power of attorney signed in blank, authorizing the transfer of said shares on the books of the company, are not attachable as the property of the assignor, although the transfer had not been formally made on the books of the company at the time of laying the attachment. And this is true whether such transfer is absolute or merely collateral.

1. The remedy by attachment is essentially a creature of the statute, and the statute on which it is founded is strictly construed. Wade on Attachment, §§ 2, 3, 325 and 333; Am. & Eng. Ency. of Law, vol. 1, 894; id., vol. 8, 1105; Van Norman v. Circuit Judge, 45 Mich. 204, etc.

2. The only provision in our laws for the attachment of shares of stock in an incorporated company is found in the Revised Code 1893, pages 568, 569.

This law evidently contemplates that the legal title to the shares of stock attached must be in the debtor as whose property it is attached. A merely equitable right or interest in personal property is not attachable. Freeman on Executions, § 116. And the language of our statute seems to be meant to put shares of stock on a par with other personal property in this respect. Section 13 says, "the shares of any person" may be attached; and in section 14, the officers of the company are required to certify the number of *shares owned* by the debtor, with the *number*, or *other marks* distinguishing

Argument for complainant.

the same. And the language of sections 15 and 16 bear out the same construction.

3. Our statutory provision for the transfer of stock does not say that stock shall be transferable *only* on the books of the corporation, but says, "the shares of stock in every corporation in this State shall be transferable on the books of the corporation in such manner as the by-laws may provide." Rev. Code 1893, 576, § 18.

4. The by-laws of the Journal Printing Company make no provision whatever for the transfer of stock.

5. On the 4th day of September, 1894, Charles William Edwards assigned to the complainant 200 shares of the capital stock of the Journal Printing Company. Mr. Edwards was at that time, and has continued ever since to be, the president of said company. The assignment was in writing, and contained a blank power of attorney, signed by said Edwards, authorizing a transfer of said stock on the books of the company. The original certificates were delivered to the complainant with the assignment and power of attorney. These shares of stock have not yet been transferred on the books of the company. The attachment at the suit of Theodore Stewart was laid in the hands of said Edwards as president of the Journal Printing Company, in December, 1894. The following authorities support the contention of the complainant. Angell & Ames on Corporations, §§ 353, 354; Cook on Stocks, §§ 487, 378, 379; United States v. Vaughn, 3 Binn. (Penn.) 394; confirmed by 1 Sumn.; Sargent v. Essex Marine Railway Co., 9 Pick. 201; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Mt. Holly Turnpike Co. v. Ferree, 17 id. 117; Bank v. Nassau Bank, id. 496; N. Y. &

Argument for complainant — Argument for defendant.

H. R. R. Co. v. Schuyler, 34 N. Y. 77; Newberry v. Detroit Mfg. Co., 17 Mich. 141; Tenney's Appeal, 59 Penn. St. 398; Scripture v. Francetown Soapstone Co., 50 N. H. 571; McNeil v. Bank, 46 N. Y. 325, 331; Cook v. Hollett, 119 Mass. 148; Johnson v. Loffin, 103 U. S. 800, 804; Dickinson v. Central Nat. Bank, 129 Mass. 279; Boston Music Hall v. Carry, id. 435, 436; Bank v. Elliott Nat. Bank, 7 Fed. Rep. 369; Norman v. Circuit Judge, 45 Mich. 204; Otis v. Gardner, 105 Ill. 436; Robinson v. Bank, 95 N. Y. 637; Turnpike Co. v. Gerhab (Penn. Sup.), 13 Atl. Rep. 90; Thurber v. Crunp, 6 S. W. Rep. 145; Wilson v. St. Louis & S. F. R. R. Co., 18 id. 286; Laird v. Wheaton Mill Co., 52 N. W. Rep. 268; Kirn v. Day (La.), 12 So. Rep. 6; Goyer Cold Storage Co. v. Wildberger, 15 id. 235; Bank of Commerce v. Bank of Newport, 63 Fed. Rep. 898; Colt v. Ines, 31 Conn. 25.

J. W. Ponder, for respondent.

Whenever a transfer of shares is made for collateral security, and not absolutely, the same shall be so expressed in the entry of said transfer. Rev. Code, 576, § 18; or, vol. 17, Del. Laws, chap. 147, § 18.

The transfer-books of a company shall be the only evidence as to who are the stockholders. Vol. 17, Del. Laws, § 22.

A transfer or assignment of stock after attachment or sale shall be void. Rev. Code, p. 569, § 15.

An attachment may be levied upon stock which has been mortgaged or pledged and the equity of redemption sold. Cook on Stocks and Stockholders, § 484;

Argument for defendant.

Edwards v. Beuget, 7 Cal. 162; Mechanics, etc., Co. v. Association, 14 N. J. Eq. 219; Manus v. Bridge-water Bank, 73 Ind. 243; People's Bank, etc. v. Gridley, 91 Ill. 457; New England v. Chandler, 16 Mass. 275; Norton v. Norton, 43 Ohio St. 509.

An attachment has precedence over an unregistered transfer made before the levy of attachment, and a pledge like a sale of stock is protected against attachment for the pledgor's debts only by registry. Cook on Stocks and Stockholders, § 489; State v. Bank, 89 Ind. 302; Shipman v. Aetna Ins. Co., 29 Conn. 245; Colt v. Ives, 31 id. 25; Pinkerton v. Manchester R. R. Co., 42 N. H. 424; Oxford, etc., Co. v. Brund, 6 Conn. 552; Webster v. Bear, etc., Co., 5 Cal. 185; Fisher v. Bank, 5 Gray, 373; Rock v. Nichols, 3 Allen, 342; Sabine v. Bank, etc., 21 Vt. 353; Bayne v. Burr, 24 Me. 256; In re Murphy, 51 Wis. 519; Conant v. Bank, 1 Ohio St. 298; Bank v. Bank, 7 Fed. Rep. 369; Sargeant v. Ins. Co., 8 Pick. 90; Peoples v. Elmore, 35 Cal. 653; Northcup v. Newton, 3 Conn. 544. See also 69 Hun, 180.

Stock transferred, but not entered on the books as required, is attachable by an unnotified creditor in his suit against the transferor. Fort Madison v. Bank, 71 Iowa, 270; Ryan v. Campbell, id. 760.

Under a statute such as exists in this State, the lien of an attaching creditor of the holder of shares on the books of the company would not be divested by a subsequent sale of the outstanding certificate, although the purchaser should be an innocent purchaser without notice. Morawetz on Private Corporations, 192, § 196; R. R. Co. v. Griffith, 76 Va. 913.

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WOLCOTT, CHANCELLOR.— Charles William Edwards, being the owner of 200 shares of the capital stock of the “Journal Printing Company,” a corporation under the laws of the State of Delaware, represented by the certificates of said company numbered 11, 12 and 13, respectively, and being indebted to the complainant in a large sum of money, to-wit: \$16,000; did on the 4th day of September, A. D. 1894, execute an assignment of the said 200 shares of the said capital stock unto the said complainant as security for said indebtedness, with a power of attorney in blank to sell, assign, transfer and set over all or any part of said stock, and to make and execute all necessary acts of assignment and transfer thereof; and did deliver said certificates of stock into the possession of the complainant, who now holds them.

The said Charles William Edwards was the president of the said the “Journal Printing Company,” and was at once duly notified of said assignment and power of attorney, and of the delivery of said certificates to the complainant.

At the time of the assignment and delivery of the said certificates of stock as aforesaid, the said complainant and the said Edwards entered into an agreement which, after reciting an objection made by the said Edwards, that the securities which represented the original indebtedness, were tainted with usury, and that the same was afterwards by mutual agreement removed by deducting from the original indebtedness the sum alleged to be usurious, and by the execution and delivery of a bond and warrant of attorney by the said Edwards to the complainant, bearing date September the 4th, 1894, for the real debt of \$15,400, the

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amount acknowledged to be the true debt; and also, after reciting that the 200 shares of the said stock had been assigned as collateral security for the payment of the said bond, as well a certain life insurance policy, issued by the Equitable Life Assurance Society of the United States, on the life of the said Edwards, for the sum of \$10,000; provided, that the said complainant would not interfere in any manner with the said Edwards in the control of the said company, or enter said bond so long as the conditions thereof were complied with by the said Edwards, and that the said securities were to be retransferred and delivered up to the said Edwards immediately upon his payment of the said debt, and also that upon the payment of \$1,000 of said whole debt, ten of the said 200 shares of stock should be retransferred to the said Edwards; and provided, also, that upon a failure for thirty days by the said Edwards to comply with any of the conditions named in said bond, or to keep said life insurance policy fully paid up, according to the conditions thereof, the said bond should thereupon become immediately due and payable, and the assignment of said shares of stock and of the said life insurance policy should become absolute; and still further provided, that upon failure as aforesaid, the complainant might sell the said shares of stock, and if there should be any balance over and above the sum due on the bond, from the proceeds of the sale, should account for the same with the said Edwards.

In the month of December, 1894, a *fieri facias*, with a clause of attachment annexed, being No. 27, as of the February Term of the Superior Court, in and for New Castle County, A. D. 1895, was issued upon a

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judgment recovered by Theodore Stewart, one of the defendants in this cause, against the said Edwards, the said judgment being No. 51, as of the November Term of said court, A. D. 1894, and the said 200 shares of stock were attached; whereupon the said Charles William Edwards, as president of the said "Journal Printing Company," left with the sheriff of New Castle County the following certificate:

"This is to certify that there are 200 shares of stock represented by certificates Nos. 11, 12 and 13 standing upon the books of this company in the name of Charles William Edwards, but notice of the assignment of said shares by the said Charles William Edwards was received by this company on or before the fourth day of September, A. D. 1894, although no transfer thereof has as yet been made on the books of the company.

(Signed.) "JOURNAL PRINTING COMPANY,
"By CHARLES WILLIAM EDWARDS,
"President."

At the February Term, A. D. 1895, of the said Superior Court, an order was obtained for the sale of said stock, and in pursuance of which the said sheriff advertised said stock for sale, to be sold on the 17th day of March, 1895, at 2 o'clock, P. M.

After the issuance of the said *fieri facias*, with the clause of attachment, and after the making of the certificate aforesaid by the president of the "Journal Printing Company," and before the day fixed for the sale, the said Charles William Edwards defaulted in the payment of the premium due on the said life insurance pol-

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icy, thus violating the condition of the said agreement entered into by him with the complainant as aforesaid.

Neither the charter nor the by-laws of the said the "Journal Printing Company" contains any provision requiring the assignment of its stock to be made upon its books. In the said bill, the complainant prayed as follows:

First. That the complainant may be declared, adjudged and decreed to be the real and sole owner of the said shares of stock.

Second. That the said defendants may be perpetually enjoined from selling under the said order of the said Superior Court, the said shares of stock, or any portion thereof, or any interest therein, and also that a preliminary injunction may issue.

Third. That the complainant may be permitted and directed to sell said shares of stock in accordance with said agreement.

The only question that I shall consider in disposing of this rule is the one involving the effect of the transfer of the shares of stock by Edwards to the complainant (independently of the agreement contemporaneous therewith), upon the rights of Stewart, the attaching creditor, one of the defendants in this cause. Or, in other words, did the simple assignment and delivery by Edwards to the complainant of the certificates of the 200 shares of stock vest in him a title superior to any rights which the attaching creditor, Stewart, gained by his process, or was it necessary that the assignment of the shares should have been made upon the books of the "Journal Printing Company."

In the statement of facts in the bill, and not denied

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by the defendants, it is alleged that nothing is contained either in the charter or the by-laws of this corporation requiring that the transfer of shares of stock be made upon its books. Despite this fact, however, it is urged by the solicitor for the defendants that the provision of section 18, chapter 147, volume 17, Laws of Delaware, entitled "An act concerning private corporations" (Rev. Code, 576), makes such an assignment necessary to vest title in a transferee. The provision referred to is as follows:

"The shares of stock in every corporation in this State shall be deemed personal property, and shall be transferable on the books of the corporation in such manner as the by-laws may provide, and whenever any transfer of shares shall be made for collateral security, and not absolutely, the same shall be so expressed in the entry of such transfer."

This contention of the solicitor for the defendants might be met with the reply that the very provision which states that the shares of stock shall be transferable upon the books of the corporation, also expressly stipulates in the continuation of the very same sentence, that this transfer shall be made "in such manner as is provided for in the by-laws of the corporation;" and that inasmuch as no manner of assignment whatever is provided for in the by-laws of the "Journal Printing Company," this provision of the general statute is inapplicable.

Assuming, however, that the by-laws of the "Journal Printing Company" did contain a provision defining a mode of transferring its shares of stock upon its books, yet I do not think that that mode of transferring the

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shares would be exclusive of all other modes, unless the charter or some general law negatived any other mode of transfer.

In the absence of any statutory provision, or of a by-law upon the subject, shares of stock in a corporation are transferable as any chose in action; and like them, the transfers of stock may be either legal or equitable. It is true that an equitable transfer cannot be enforced at law in the name of the transferee, but it can be so enforced in a court of equity. For example, a bond assignable by its very terms, the assignment of which by our act of Assembly requires the ceremony of a seal and one witness to authorize the assignee to maintain a suit in his own name, may nevertheless be transferred without the formality of a seal or witness so as to exempt it from attachment process, in the hands of a *bona fide* purchaser or transferee.

I can see no reason for giving a provision in any statute like the one referred to, such a strict construction as that contended for. If such were the established rule of construction, the facilities for the negotiation of loans and other commercial transactions upon the basis of shares of stock in corporations would be very seriously impaired. The spirit of the whole statute negatives any such narrow construction. Provisions similar to the one quoted, when found either in the charter itself, or in the by-laws, or in some general statute, have been held by the most learned text-book writers and the most eminent judges as applicable only to the relation existing between the corporation and its stockholders — to the questions, who shall vote, to whom dividends shall be paid, and to enable the corporation to protect any

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lien it may have upon the stock as between itself and a stockholder indebted to it. It is certainly difficult to conceive how any other construction can be given to such a provision. Surely, not on the ground of public policy. The requirement that transfers of stock shall be made upon the books of the corporation can by no possibility be of benefit to any other person than a stockholder of the corporation itself, for the simple reason that such transfers are as secret and as private in their nature, so far as the public is concerned, as would be the private delivery of a stock certificate from the pocket of one individual to that of another. The books of a corporation are private. They are not public records open to the inspection either of the public or a creditor of one of the stockholders, and the strictest requirement that transfers of stock be made upon the books could give no notice to any individual outside of the stockholders themselves. Therefore, the contention that the transfers of shares of stock should be made upon the books of the corporation upon the ground that such transfers give to the act greater publicity, and thereby prevent members of the corporation from obtaining false credit, utterly falls to the ground. If further argument were needed to prove the untenability of the position assumed by the defendant's solicitor, it would be found in the fact that prior to any statutory enactment rendering shares of stock liable to attachment process, provisions similar to the one now under consideration were well nigh universally incorporated in the charters or by-laws of all corporations, thus substantiating the position that I have taken that they were de-

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signed to apply simply to relations between the corporation itself and its stockholders.

The broader and more liberal view of this provision is fully sustained by the last paragraph of section 22 of the general statute cited by the solicitor for the defendants. It is as follows:

“The stock ledgers, or, if there be none, then the transfer-books of the company, shall be the only evidence as to who are the stockholders entitled to examine such lists” (voting lists), “or the books of the company, or to vote in person or by proxy at any election.”

Herein are to be found the reasons for the insertion of the paragraph in section 18, making provision for the transfer of shares or certificates of stock upon the books of the corporation. The legislature deemed it proper to make the transfer-books of the company, in the absence of stock ledgers, the only evidence as to who is entitled to examine the voters' lists, the books of the company, and to vote at any election. If the legislature had not provided a means whereby the stock might be transferred upon the books of the company, it would have placed itself in the absurd position of requiring a particular kind of proof of certain facts without making any provision for obtaining that proof. The conclusion seems, therefore, irresistible that the interest of the general public contended for by the solicitor for the defendants, did not enter the scope of the legislative intent, inasmuch as the recital of the reasons for the former provision is expressly restricted to relations existing only between the stockholders and the corporation itself.

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The California cases cited by the defendants' solicitor, and so confidently relied on by him, do not sustain his contention because there is no analogy between the California statutes and that of our State. The California statute in its phraseology differs radically from ours. The former provides that "no transfer of stock shall be valid for any purpose whatever except to render the person to whom it shall be transferred liable for the debts of the company according to the provisions of this act, until it shall be entered therein" (the books of the corporation), "as required by this statute, by an entry showing to and from whom transferred." Our statute simply provides that shares of stock "shall be transferable upon the books of the corporation in such manner as the by-laws may provide." There is no language in it to make the statutory mode of transferring stock exclusive of any other mode, as that employed in the California statute.

The case of *Fisher et al. v. Essex Bank*, 5 Gray, 373, is also relied upon as authority for the narrow rule of construction insisted upon in this case. Here, however, we are again confronted with an equally wide difference in the language of the Massachusetts statute, and that of our own. The paragraph in the Massachusetts statute providing for the transfers of shares of stock in a corporation, expressly declares that such shares are transferable *only* on the books of the corporation. Chief Justice Shaw, in construing this paragraph of the statute, lays stress upon the word "only," as negating any other mode of transfer. The learned judge said,— "that the word 'only' carries an implication as strong as negative words could make it. It was not to pre-

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scribe one mode, leaving others unaffected; it made that mode exclusive."

The same criticism applies with equal force to the Illinois cases, and nearly, if not all, the other cases cited by the solicitor for the defendants, because of the manifest variance between the statutes of those States and of our own State. The rule is, therefore, made absolute, and a preliminary injunction as prayed for is ordered.

Syllabus.

FANNY C. WILLIAMS v. ODESSA & MIDDLETOWN RAILWAY Co.

New Castle, September Term, 1895.

Railroads — location of; What constitutes; Right to abandon a proposed route and select another; Liabilities on condemnation proceedings; Eminent domain; Inquisition and condemnation proceedings; Election.

1. It is the settled law of this State that the condemnation proceedings alone establish nothing, vest nothing, and fix nothing except only the price at which the land inquired upon may be had from the proprietor by the corporation.
2. The award of freeholders on condemnation proceedings does not, of itself, render the corporation liable to the landowners for the amount fixed by the award.
3. Upon an abandonment by a corporation, after condemnation proceedings, of a proposed route, the corporation is liable not only for the cost of such condemnation proceedings, but also for all damages and expenses reasonably incurred by the owners of land along such abandoned route, by reason of those proceedings.
4. Except through *laches* or waiver, the power of election cannot be lost, except by such a selection of one of the subjects or rights embraced by the election, as confers a positive right to the subject or right so selected, upon the party in whom the power of election once existed.
5. In order to constitute such a location of the route of a railroad in this State as will exhaust the power of eminent domain conferred in its charter, some acts must

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be done which vest mutual rights or liabilities between the corporation and landowners along such route.

6. A location is not a mere right, it is an act; it is not a power to do a thing, it is the thing itself.
7. Difference between the English law in regard to railroad corporations and condemnation proceedings, and that in this State.
8. By the charter of the O. & M. railway, the respondent, it was provided "that the said company shall have power to locate, survey, and purchase such lands and rights of way within the limits of New Castle County as said company may deem necessary for their purpose," the termini being specified; and by another provision of the charter, the mode of having freeholders appointed for inquisition and condemnation proceedings, was fixed, and it was then provided that "the said freeholders, or a majority of them, shall certify their finding and award to both parties, whereupon the said company, upon paying the damages so assessed, or depositing the same in the N. O. N. Bank, to the credit of said owner or owners, shall become entitled to have, use, and enjoy said lands and rights of way for the purpose of said company forever." The respondent proceeded to survey its proposed route. Being unable to agree as to the price of the lands desired, condemnation proceedings were had under its charter. The respondent and all parties interested were present, either in person or by attorney, during these proceedings and at the announcement of the award. Immediately upon this announcement the respondent asserted that the damages fixed were more than it could pay, and notified the freeholders that it was unnecessary to serve notice of the award as provided in its charter. No such notice was in fact served, and neither the whole nor any part of the damages was paid, tendered, or deposited as provided in the charter. Subsequently, the

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respondent applied for and secured the appointment of another set of freeholders for the condemnation of a right of way over another and entirely different route; *held*, that the survey and condemnation proceedings over the first route did not exhaust the power of eminent domain conferred upon the respondent by its charter, and that it had the right to change its first proposed route.

INJUNCTION BILL.—It is admitted and agreed by and between the complainant and respondent respectively that the statement of facts hereinafter set forth is a true and correct statement thereof, and that for the purposes of argument and the decision of this cause, shall be held and taken to be conclusively proved and established:—

First. That the complainant, Fanny C. Williams, of St. Georges Hundred, New Castle County, and State of Delaware, is seized in fee-simple of a certain lot or tract of land situate in the Town of Middletown, in said hundred, containing about two acres and eighteen perches of land, more or less, lying and being on a certain private lane or street, commonly known as Hamtown lane, but being in fact a continuation of Lake street, in said town, said lane or street on which said lot is situate, and which extends to the center line thereof, having been opened by the owners of the lots fronting thereon, but never having been dedicated to public use, which said lot is particularly bounded and described as follows, to-wit: All that certain lot, piece or parcel of land, situate on the north side of Lake street, in Middletown, county and State aforesaid, containing within the following metes and bounds, to-wit: Beginning at a stake in the centre of Lake street, a corner for this lot and the land of Mary H. Jones; thence with

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said Lake street south eighty-one and one-quarter degrees west nine perches and thirteen links to a stake in said Lake street, a corner for a lot of Benjamin T. Biggs; thence leaving Lake street and running with the line of the said Benjamin T. Biggs, north eight and three-quarters degrees, west thirty-four perches and fifteen links to a stake in George F. Brady's line, a corner for this lot and land of the said Brady and Biggs; thence with land of said Brady, north eighty-seven and three-quarters degrees, east nine perches and fifteen links, to a stake in said line, a corner for this lot and land of the said Mary H. Jones; thence with the land of the said Mary H. Jones, south eight and three-quarters degrees east, thirty-four perches and eight links to the place of beginning.

Second. That by an act of the General Assembly of the State of Delaware, passed at Dover, April 8, 1873, entitled "An act to incorporate the Odessa & Middletown Narrow Gauge Railway," being chapter 513, vol. 14, Laws of Delaware, page 560, and by another act of said General Assembly, passed at Dover, January 30, 1889, entitled "An act to amend an act to incorporate the Odessa & Middletown Narrow Gauge Railway, passed at Dover, April, 8, 1873," being chapter 620, vol. 18, Laws of Delaware, page 769, the same being an amendment to the act first mentioned, a company was chartered and incorporated and authorized to be organized under the name, style and title of "Odessa & Middletown Railway," for the purpose and with the powers described and limited in and by said acts; and that the said acts of assembly, being public acts of the State, and published as aforesaid as such, may be re-

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ferred to and used for all purposes material to the proper and correct argument and decision of this cause.

Third. That the said defendant, the company incorporated by said acts, as provided therein and thereby, having been duly organized under said acts, and officers thereof having been elected and appointed after numerous surveys, selected a route for the proposed railway and the line along which it intended to construct the same, provided the damages which might be assessed for the right of way when assessed did not exceed the amount which the said company felt able and willing to pay, and designated and staked out said line over the lands of those persons whose lands were crossed by its said proposed railway, drew plans and maps of the same for its own use, showing the route, distances, width and grades of its proposed roadway, and with the necessary data for its own use, and for the use of the commissioners and freeholders who were afterwards called on to condemn certain portions thereof in viewing the lands to be condemned and ascertaining the damages to be awarded; and that said line so selected and marked and designated as aforesaid, began at a point in the Town of Odessa, formerly Cantwell's Bridge, in said hundred near the bridge over the Appoquinimink creek, and extended thence in a generally westerly direction through, over and across lands belonging among others to the heirs or devisees of William M. Vandegrift, deceased, Samuel Pennington, John C Corbit and Mary Appleton, thence in a generally northwesterly direction, through, over and across lands belonging to the said Mary Appleton, a short distance through and along the public road leading from said Town of Middletown

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to the Town of Odessa, then through, over and across lands of Mary Vail, of the heirs of John Alston, of Mary N. Merritt, Edwin R. Cochran, Charles Johnson, Lydia A. Price, George F. Brady, of the heirs of Col. Joshua Clayton, of Mary Ash and of Samuel Pennington to the main line of the Delaware railroad, but at no point on said line so selected and designated did said line touch, enter upon or affect any of the lands of said complainant described in her bill of complaint filed in this cause, or occupy or affect in any way said Hamtown lane or Lake street, or any right of way belonging to said complainant or appertaining to said lands described in her said bill, and a plot of the route above described showing the location of said line and the lands of the complainant is appended to this statement and to be taken as a part thereof.

Fourth. That said defendant company agreed with certain of the owners of the lands through, over and across which its said line was staked out and designated as aforesaid for the purchase of and obtaining the lands and rights of way necessary for the purposes of constructing the railroad provided for by said act, and the use of said railway, but, having been unable to agree with all the owners of lands through which its said proposed line was to be constructed for the purchase of such lands and rights of way as were required for its purposes and the purposes of said acts, on the 27th day of August, A. D. 1889, applied as required by said act first mentioned, to the Chief Justice of the State of Delaware, to appoint five judicious and impartial freeholders of said New Castle County to view the premises through and over which the proposed line so staked out

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and selected would pass, and upon said application, his Honor, the Chief Justice aforesaid, duly and properly appointed and commissioned five judicious and impartial freeholders of said county, to-wit: Henry A. Nowland, Nathaniel Williams, Henry Cleaver, John T. Cheairs and Henry H. Appleton, as provided in section 6 of the said first-mentioned act, to view the premises of those landowners through which said railway was to be constructed, and assess the damages, which such of the owners who had not agreed with said defendant company as aforesaid, would sustain by reason of the taking of the said lands and rights of way for the use of said company, and annexed hereto is a true and verbatim copy of the application of said defendant company to the Chief Justice, and of the order of the Chief Justice thereon, and that the same shall be taken as a part of this statement.

Fifth. That the said freeholders so appointed duly and properly qualified themselves, elected said Henry A. Nowland their chairman, and, as required by said act, condemned said lands and rights of way through and over said disagreeing owners, and on or about the 15th day of October, A. D. 1889, assessed the damages of said landowners with whom said defendant company was unable to agree, fixing the amounts as shown in a paper appended to this bill, filed in the cause, and which shall be taken as a part thereof — and notified said company of such awards, and said company learning the amount of said awards or assessments, declared that they, the said awards and assessments, were so large that said company could not afford to pay the same, and that said road or railway so selected could not be con-

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structed by it, and none of said amounts so assessed or awarded as damages have ever been paid, tendered or deposited in bank, as required by said act. The facts respecting the notification of the company and the circumstances relating thereto being as follows: Many or all of the landowners whose lands were to be condemned for the use of said defendant were notified of the day, hour and place of meeting of the commissioners or freeholders by William R. Polk, representing the company in the name of said commissioners, and then and there appeared some in person and some by their attorneys, the said respondent being represented by said William R. Polk, and after viewing the lands of the said owners respectively, and hearing the statements and arguments of the attorneys, and owners, and said William R. Polk, representing the company, and duly considering the same, the freeholders decided upon the awards aforesaid for the owners respectively. And the said Nathaniel Williams who had been made secretary of said board, informed said William R. Polk that written notices of said awards and the amount thereof should be given the landowners respectively and offered to furnish said Polk with a copy of a proper form in which said notices should be drawn, but said Polk representing said respondent, stated to said Nathaniel Williams that it was no use to take the trouble of preparing and serving such notices, that the respondent could not pay the amounts awarded as damages by said freeholders or commissioners, as it had not enough money, and the railroad could not be built on that line, and no one, either respondent or freeholders, gave or prepared any formal written notices of the awards to any of the

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landowners whose lands said line was selected and to be constructed as aforesaid, and none of said owners received the formal written notices provided for by said acts, but all were present or represented, and had verbal notice of the amounts of respective awards as shown in the list appended to the bill of said complainant, and so matters remained until the latter part of the year, A. D. 1891, when said company, without any further grant or delegation to it of the right to exercise the right of eminent domain by said General Assembly, applied a second time to his Honor, the said Chief Justice, for the appointment of other freeholders as aforesaid, to condemn lands and assess damages to owners along an entirely different route, and his Honor, the said Chief Justice, appointed William Cooch, John Pilling, Theodore F. Armstrong, James Garman and Henry H. McMullin to view the lands of those owners with whom said defendant company could not agree, for the purchase of rights of way required for a line of railroad which said defendant company hath commenced to construct, beginning at a point near the Phosphate Works, now or late of Lord and Polk, in the Town of Odessa, thence running through the streets of said town, and through and along the public road between the said Towns of Odessa and Middletown, to a point at or very near the limits or boundary of said Town of Middletown, thence along the road known as Hamtown road, to or near its intersection with said Hamtown lane, or Lake street; thence down the said lane, over and across the lands of the complainant, as above described, and lands of other persons in said lane, into Lake street proper; and thence down the same and

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across lands of Samuel Pennington to the main line of the Delaware Railroad, in the Town of Middletown, which route is shown in red ink on the plot hereinafter referred to and hereto appended.

Sixth. That said freeholders last appointed as aforesaid on Tuesday, the 12th day of January, A. D. 1892, at the instance and request of said company, and under color of authority of said acts, and said appointment as aforesaid went upon said described lands of said complainant and against her protest formally made to them by her solicitor undertook, pretended and proceeded to assess her damages for a right of way across her said lands for the use of said defendant company on the line last described and awarded as her damages the sum of \$25, which she is unwilling and refused and refuses to accept, said complainant then and now claiming that all of said last described proceedings were unlawful and without any lawful authority whatsoever, but said deponent did deposit the said sum of \$25 awarded to said complainant as damages to the credit of said complainant in the New Castle County National Bank of Odessa, and did cause to be tendered to her a certificate of the cashier of said bank to that effect, but she has never drawn or used said money.

Seventh. That said defendant claiming to act under and by authority of said acts of the General Assembly, and claiming that the condemnation of said complainant's lands as aforesaid, and the assessment and deposit for her damages as aforesaid, hath been duly and legally authorized and performed, is engaged under color of the authority granted by said acts in constructing the roadbed for a railroad on a part of the public

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road leading from Middletown to Odessa, in St. Georges Hundred, New Castle County, without other proceedings or powers than those herein set forth, the Town of Odessa being about three miles distant from the Town of Middletown, and intends to place thereon railroad ties and rails between the northerly side of said road and the center thereof, and to operate a railroad through and along said road on the line being graded as aforesaid, and thence to extend the same across a corner of land of Mary N. Merritt into said Hamtown road; thence through and along the same to said Hamtown lane; then down the same and across the lands of said complainant as aforesaid, which, under color of the condemnation proceedings and assessment of damages as aforesaid, it intends to take for the use of it, the said defendant company, and to construct thereon a railroad as aforesaid and to operate the same against the will and wish of said complainant.

And the said complainant claiming that said acts threatened and done are and were unlawful, filed her bill in this cause praying relief as therein set forth, and said defendant claiming that all of said acts complained of and above set forth are lawful, hath answered thereto, and both of said parties to this cause have agreed that the facts which could be proven by them respectively, are as set forth in this statement.

WILMINGTON, DEL., Aug. 27, '89.

To the Hon. J. P. COMEGYS, *Chief Justice, Dover, Del.*

In pursuance of the 6th Section of an Act to Incorporate "The Odessa and Middletown Narrow Gauge Railway," passed at Dover, April 8th, 1873, (see Acts of 1873, page 560, chapter 513), and an Act passed

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January 30th, 1889, amending said act. (See Acts of 1889, page 769, chapter 620.)

I, as president of the Odessa and Middletown Railway Co., would respectfully ask that you appoint at your earliest convenience five freeholders, as commissioners to view the line of said railway as proposed and assess damages to the owners of lands through which it may pass. With much respect, I am,

Very truly yours,

WM. TAYLOR,

President of the Odessa & Middletown Railway Co.

AT CHAMBERS, DOVER, *September 2, 1889.*

In pursuance of the above application, and of the authority conferred upon the Chief Justice for that purpose by the sixth section of chapter 513 of the Laws (vol. 14, p. 560), I do, as such Chief Justice, hereby appoint the following judicious and impartial freeholders of New Castle County to perform the duties designated by said section, viz.: John P. R. Polk, Henry Cleaver, Henry H. Appleton, John T. Chairs and Nathaniel Williams.

In witness whereof, I have hereunto set my hand, the day and year aforesaid.

J. P. COMEGYS,

Chief Justice of Delaware.

And now, to-wit, this 17th day of September, 1889, it appearing that by the statement of John P. R. Polk, that he is not a freeholder of New Castle County, I therefore appoint Henry A. Nowland in his place.

J. P. COMEGYS,

Ch. J.

Argument for complainant.

Willard Saulsbury, for complainant.

The contention in this case on the part of the complainant is that the commissioners first appointed by the Chief Justice having performed their duties are *functus officio*, and having exhausted all powers in them invested, and that subsequent commissioners could be legally appointed; and, that the line as first selected, designated, marked out, staked out, mapped and condemned, could not be changed or varied, that all right of eminent domain delegated to the company has been exhausted.

Acts of assembly delegating the right of eminent domain must be strictly construed. Cooley's Const. Lim. *530.

So soon as the company locate their road and have made an effort to agree with the landowner, and not before, the process may be commenced by either party, for ascertaining the damages; and when they have been ascertained, by report and judgment thereon, the judgment settles the right of landowner to such damages, just as completely as any other judgment, and he has just the same right of execution upon it. The power of taking any man's land is exhausted by a location which it is too weak to retain; it cannot be indulged with another choice. Neal v. P. & C. R. R. Co., 2 Grant's (Penn.) Cas. 137.

Locating is the act of selecting and designating land which the person making the location is authorized to select. City of Richmond v. County of Henrico, 2 S. E. Rep. 30.

Argument for complainant.

Location is the designation of the boundaries of a particular piece of land, either upon record or the land itself. Black's Law Dict. 730.

Location is often applied to *denote* the act of selecting and marking the line upon which a road, canal or highway is to be constructed. Bouv. Law Dict.

The word "locate" is a term of art in which the Legislature can have but one meaning, as was said by Shaw, Chief Justice, "the effect of the location is to bind the land described to that servitude." Abbott v. N. Y., N. E. R. R. Co. (Mass.), 15 N. E. Rep. 100; B. & P. R. R. Co. v. Midland Ry. Co. et al., 1 Gray, 340.

The act of assembly chartering this corporation distinguishes between "location" and "construction." The words are "locate and construct." 14 Del. Laws, 560.

The words "locate" and "location" are terms which have long been used in the land laws of this and other States, and have acquired, as used in other States, a fixed signification. So they have been used in regard to railroads from the first introduction of this species of highways in England and in this country; and if any question arises in a particular case as to the sense of either of them, its sense must, by the court, be gathered from its use, as it learns and knows the sense of all other terms. N. & N. W. R. R. Co. v. Jones et al., 2 Coldw. (Tenn.) 595.

When a railroad company filed its location in a proper manner, and with an accompanying plan, and plaintiff's land was included in said location, although his name did not appear in said location and plan as one of the owners, the failure of the company to furnish plaintiff

Argument for complainant.

with a plan of the land taken under Public Statutes, Massachusetts, chapter 112, section 106, does not affect the company's title or suspend the running of the time for applying for damages. *Brooks v. Old Colony R. R. Co.* (Mass.), 15 N. E. Rep. 555.

Code N. C., § 1952, requires a railroad company, before constructing any part of its road, to survey the line of the proposed road, make a map thereof, file certificates that it has located its road according to such surveys, give notice, etc.; and section 1944 requires that performance of these conditions shall be alleged in the petition in proceedings to condemn lands. Held, that performance of these conditions was indispensable and that failure to allege the same was fatal. *Durham & N. Ry. Co. v. Richmond & A. R. R. Co.* (N. C.), 10 S. E. Rep. 1041.

The location of a line is always a prior step to its purchase or condemnation. *Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 240; *L. S. & M. S. R. R. Co. v. N. Y., L., etc., R. R. Co.*, 89 N. Y. 442.

A little thought makes it apparent that location is prior to condemnation, for if it were not, the commissioners would not know what to condemn.

Having, therefore, established most conclusively that the defendant corporation did in fact legally locate its line of railway, the next question to be considered is, having so established its line in a strictly legal sense, and, in fact, could it thereafter make any change in its line, if such change necessitated the exercise of the right of eminent domain? We think clearly it could not, which we think will be as conclusively established by

Argument for complainant.

the following authorities, as has been the fact that a location was in reality made.

Grants of corporate power, being in derogation of common right, must be strictly construed. This is especially true when the power claimed is the delegation of the right of eminent domain. *Cooley's Const. Lim.* *530, *660.

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common rights, are not to be extended by implication, but are to be strictly construed. *Am. & Eng. Ency. of Law*, p. 522, vol. 6; 46 N. Y. 546; 7 *Am. Rep.* 385; 26 *Penn. St.* 355; 43 *Eng. C. L.* 954.

Only one condemnation is allowed. New authority must be obtained for a new condemnation. The principle of no second exercise of eminent domain grows out of the old law of election, viz.: If one has an election and determines it, it is determined forever. *Com. Dig. Election*, chap. 2; *Pierce on Railroads*, 254.

The power of eminent domain delegated by the legislative enactment is exhausted after one exercise. *Mills on Em. Dom.* 58; 35 *Barb.* 373; 32 *id.* 358; 9 *Paige*, 323; 10 *Bush*, 529; 1 *Allen*, 316.

When a corporation chartered for the purpose of constructing a railway has located its line, it cannot change the location and adopt a new route, unless the power to do so is expressly granted in its charter, and then only in the manner indicated. When the power thus conferred upon a company has once been exercised, it is exhausted. *Mason v. Brooklyn & Newton R. R. Co.*, 35 *Barb.* 373.

Argument for complainant.

When authority is given to locate and construct a road upon a route to be indicated in a certain manner, that route, when thus indicated, is in effect incorporated in the charter, as if the authority thus conferred were expressly and distinctly confined to the precise route laid down in the subsequent proceedings; and the powers of the company are as finally and effectually limited to that precise line of road as if such were the express provisions of the charter. *Mason v. Brooklyn & Newton R. R. Co.*, 35 Barb. 373.

A railroad having made its location and adhered to it for many years, it is concluded by what it has done. *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358.

A railroad having legally located and established their road between the termini presented in their charter, their whole power has been exerted and exhausted. *Francis Bringham v. Agricultural R. R. Co.*, 1 Allen, 316.

Statutes derogatory to private rights must be strictly construed. The right to "locate and construct a railroad" can be exercised but once without a further grant. *Moorhead v. Little Miami R. R. Co.*, 17 Ohio St. 340, 349, 350, 351.

When a railroad has once selected and located its route it cannot change it. *Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 236, 238, 239, and syllabus.

When a corporation chartered for the purpose of constructing a railway has located its line, it cannot change the location and adopt a new route; when the power thus conferred upon a company has once been exercised, it is exhausted. *Mason v. Brooklyn City & N.*

Argument for complainant.

R. R. Co., 35 Barb. 373, 381; *Morris & Essex R. R. Co. v. Central R. R. Co. of N. J.*, 31 N. J. Law, 205-209; *People v. N. Y. & Harlem R. R. Co.*, 45 Barb. 78.

To admit the right to excessive exercise of the power would be to subject all the land in the State to condemnation at any future time. *Mill's on Eminent Domain*, p. 58.

It is the very sensible rule of the common law, "that if a man once determines his election, it shall be determined forever." *Com. Dig. Election*, chap. 2. The maxim has been deemed peculiarly applicable to acts done under the authority of the State, and it has been held, repeatedly, that the powers given to a corporation to take lands, when once exercised, are exhausted. Thus the right of a railroad company, after the road was actually located, to make a relocation or to abandon the route adopted by them for a more eligible one, was entirely repudiated in *Moorhead v. The Little Miami R. R. Co.*, 17 Ohio St. 340; *Morris & Essex R. R. Co. v. Central R. R. Co.*, 31 N. J. Law, 205.

"When the canal is completed, the powers of the company are exhausted, and in making the canal, the proprietors are not at liberty afterwards to injure the interests of parties, by making what is quite a different canal." This principle applies with equal force to railroads. *Blackmore v. The Glamorganshire Canal Co.*, 1 Myl. & Keene, 154.

When the choice of discretion as thus given by statute has been exercised, the power is exhausted, and the location cannot be changed. *Lewis on Em. Dom.*, § 258.

Argument for complainant.

The practical location of a railroad within the prescribed limits would exhaust the power conferred, and prevent a subsequent change of location, except by consent of the Legislature. *The People v. N. Y. & Harlem R. R. Co.*, 45 Barb. 73.

When a road has once been opened, its location cannot afterwards be altered for the purpose of placing it on what may be supposed to be its proper site. If it can be moved once, it can be moved twenty times upon the same principle. All authority under the order to open is exhausted by the action of those to whom it was directed, and cannot be resumed, although the first location was not according to the report of the viewers. *McMurtrie v. Stewart*, 21 Penn. St. 322, 325; 48 id. 305.

However it may be with railroad companies formed under general laws, when a company established by a special charter has once fixed its location, and taken the necessary steps to establish it, its power of election having been exercised, it has no power to recall or change it without the consent of the Legislature, even though the change only involves the exercise of a power which they possessed and which they have exercised under the charter in the first instance. 2 Wood's Railway Law, § 238.

When the charter of a railroad company merely fixes a few points through which the road is to pass from its commencement to its terminus, leaving the location of the roads between the points specified to the discretion of the corporation, the railroad company having once located the road, their power to relocate and for that

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purpose to appropriate the property of an individual has ceased. 2 Ohio St. 236.

In laying out turnpike companies, the power of locating gates, given by the charter, is exhausted when the power is once exercised, and consequently the company has no power to subsequently remove the gates to other places. The laying out of railroads being similar to that of turnpikes, the same principle will apply. *Hartford, New London, etc. v. Hosmer*, 12 Conn. 360; *The State of Conn. v. Nor. & Dan. Turnpike Co.*, 10 id. 157.

The railroads of this State have all recognized the foregoing doctrines and principles by obtaining special legislation to enable them to widen their rights of way and by obtaining branching powers. 17 Del. Laws, W. & N. 309; 17 Del. Laws, P. W. & B. 299.

Railway companies may have experimental surveys at pleasure, before finally locating their route, but they cannot have experimental suits at law, as a means of chaffering with landowners for the cheapest route. The power of taking any man's land by such company is exhausted by location. It cannot be indulged with another choice. *Neal v. Pittsburgh & Connellsville R. R. Co.*, 2 Grant's (Penn.) Cas. 137.

Edward Ridgely and Henry Ridgely, Jr., for respondent.

The single question in this case is, did the act of this respondent, a railway corporation duly incorporated under the laws of Delaware, in having surveyed one particular route between the termini specified in its charter,

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the Towns of Odessa and Middletown, and having condemned certain lands of disagreeing landowners along such route by condemnation proceedings authorized under its charter, but no certificate of the award being made, and no payment, tender, or deposit of the damages awarded, exhaust the power of electing a route between those termini conferred by its charter? If the answer be "yes," then, unquestionably, this respondent had not the right to apply for and secure a new condemnation by a new set of freeholders of land along a new route between those said termini; but if it be "no," it is equally certain the complaint can have no further standing in this court.

In the consideration of the question propounded, it is well to clear away all unnecessary and extraneous matter. In this manner we shall escape any disturbance proceeding from the citation of authorities based upon general railway, or general corporation, statutes. Delaware, unlike so many of her sister commonwealths, has absolutely no general statute of this kind in anywise affecting the question before the court. Further, no nice question, as to the right of the same set of freeholders or inquisitors to sit more than once as a condemnation jury, need trouble us. Here was a new and distinct set of freeholders appointed under a new and distinct application.

With this mass of confusing matter thus disposed of, we are left simply with the provisions of the act of incorporation of this respondent company itself, and those general principles governing eminent domain and its exercise by private corporations, independent and apart from that class of statutes to which we have referred as being entirely absent in the jurisprudence of this State.

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In the consideration of the charter of this Odessa & Middletown railway, it must first of all be noted that the route of the proposed railroad is not set forth, nor described with any degree of particularity. This is a most important point. See the language of the charter itself.

By section 9 of the act of incorporation (Laws of Del., vol. 14, p. 562), it is provided: "That the said company be, and they are hereby authorized, to locate and construct a railway from any point on the northwest side of the Appoquinimink creek, in the Town of Odessa, extending through and along such of the public streets, and so much of the public roads in St. Georges Hundred, as they may select for that purpose, to some point within the town limits of Middletown," etc. And in section 6 of the same act (p. 561), it is provided: "That the said company shall have power to survey, locate, and purchase such lands and rights of way within the limits of New Castle County as said company may deem necessary for their purpose," etc.

It would seem unnecessary to dwell upon the wide range thus conferred upon the company, in which to select their proposed route. Even as to the very termini there is considerable scope. One point can be anywhere on the northwest side of the Appoquinimink creek in the Town of Odessa, and the other point of termination can be any point whatever in the Town of Middletown. As to the line of route between these termini, nothing of limitation whatever is made, except it be as to the "public roads in St. Georges Hundred."

From these provisions, it is very manifest that the

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case now before the court is very different from those in which the charter did specifically limit and define the route.

Still another point in this connection is to be noted. In this State there is no general statute, nor any provision in the charter of this respondent company, requiring the filing of a map or description of the proposed route in some public office, before the work of construction. So here again is very apparent the striking dissimilarity between the present case and those where, either by the charters themselves, or by general statutory provisions of the States in which such cases have arisen, the filing of such a map or description is a necessity which has been complied with by the railroad company.

An appreciation of this fact will remove still other elements of possible disturbance.

Since then the General Assembly, the supreme power of this State, has been so liberal in thus conferring such breadth of selection as to the route of the Odessa & Middletown railway, why should the court seek to curtail it? The principle of law that statutes delegating the power of eminent domain must be construed strictly will not, we submit, avail to justify such curtailment. That principle can only be applied where the act itself is ambiguous, never in the teeth of positive and express provisions.

We are narrowed down to the conclusion, then, that only some act of this respondent itself, subsequent to its charter, will have such an effect.

The Odessa & Middletown Railway Company did survey one proposed route, and did apply for and secure the

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appointment of a set of freeholders to condemn certain lands along such route. Further, those freeholders did actually sit and assess damages for such lands. These, and these alone, constitute all the acts of this respondent subsequent to its charter up to the time when it made its application for a new set of freeholders to condemn lands along another route.

We are brought, then, to the first question, did all of these acts, or any one of them, exhaust the power of election as to its route, conferred by the charter?

The following authorities will be found to fully prove that such is not the case: *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. 395; *Moritz Schreiber et al. v. Chicago & Evanstown R. R. Co.*, 115 Ill. 340; *Chicago, St. Louis & Western R. R. Co. v. Gates*, 120 id. 86; *D. & N. O. R. R. Co. v. Lamborn*, 8 Colo. 380; *Graff v. Mayor & City Council of Baltimore*, 10 Md. 544; *Morris et al. v. Mayor and City Council of Baltimore*, 44 id. 598; *Cherokee Nation v. Southern Kansas R. R. Co.*, 135 U. S. 641; *Manchester & Keene R. R. Co. v. Keene*, 62 N. H. 81; *Hayes et al. v. Cincinnati & Indiana R. R. Co.*, 17 Ohio St. 103; *N. M. R. R. Co. v. Lackland*, 25 Mo. 515; *In re Washington Park*, 52 N. Y. 144; *Black v. Mayor and City Council of Baltimore*, 1 Md. 235; *Burlington & Missouri R. R. Co. v. Sater*, 1 Clark (Iowa), 421.

Many of the books are full of the statement, that a location exhausts the power of eminent domain, but there is a singular lack of authority as to what act or series of acts will constitute a location.

The word "location" itself implies, we submit, the right to go upon the land, to construct the proposed rail-

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way, and to operate it when completed. It can scarcely be seriously contended that a railroad may be located on land over which the incorporators have no power, right, or control.

It will be seen, therefore, that one of the conditions precedent to a location, is the acquiring the right to the land, the seat of the supposed location.

Applying this principle to the case of the Odessa & Middletown railway, we find that complainant must utterly fail unless it is shown that this respondent company had a vested right in and to the land over which its first proposed route was to have run.

As a matter of fact, however, this was far from being the case. By the very authorities quoted above, it will be clear that no such right did vest in this respondent company by anyone or by a combination of all of the acts of this company.

A survey, condemnation proceedings, the finding or award, all these, unless accompanied by a payment, tender, or deposit of the damages, will not amount to a location simply because none of those acts vested any right in the railroad company to locate their line.

It must certainly be admitted that no railroad company has the legal right to enter upon condemned lands until the condemnation money has been paid, tendered, or deposited. The provisions both of the Federal and of the State Constitution are plain on this head. If, then, there be, up to that point, no right of entry, how can there be a location? If a location may be effected without a right to locate, then, and then only, can such a result be forced from the acts of this respondent company.

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Let us take the language of the charter itself on this same point: "And the said freeholders, or a majority of them, shall certify their finding and award to both parties, whereupon the said company, upon paying the damages so assessed, or depositing the same in New Castle County National Bank of Odessa, to the credit of said owner or owners, shall become entitled to have, use, and enjoy said lands and rights of way for the purposes of said company, forever. The expenses of the assessment of the said damages shall be paid by the said company."

Can there be any doubt as to the meaning of the words quoted? The payment, tender, or deposit of the damages awarded is the condition precedent, expressly made such by the legislative grant, to the vesting of any right to the lands condemned in this respondent company.

Take the language of Chancellor Saulsbury, in the case of *Wilson v. Baltimore & P. R. R. Co.*, 5 Del. Ch. 524, which is as follows: "The commissioners are authorized to render no judgment against the person or the thing. They assess damages. They make an award which binds nothing. No executions, or other process, can be issued thereon, and no proceedings can be taken under it, until the money is paid or deposited as the act prescribes."

Can words be clearer or stronger than these? The condemnation proceedings and the award itself gives no right on either side, and renders no liability. The company cannot go on the land; the landowners cannot sue for the sums awarded. The whole proceeding is nothing more than the fixing of the price for which the unwilling

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landowner must sell his property if it be paid to him. After the award, the owner of condemned land is in precisely the same position to the railroad company as is any one of the owners of property who has bound himself to accept a certain stipulated price if the company proffers it.

The freeholders in condemnation proceedings are merely the umpires between two disagreeing classes. After they make their award, the disagreement as to the price is finally settled, but that is all. After the award, the two parties are perforce in the position of being reconciled as to the price of the land in dispute, but in no other way has their former position towards each other been changed.

In some of the States, the award becomes a judgment against the corporation. Such a provision in our law would unquestionably completely alter the status of the parties. If a judgment, then a liability is fixed, and a right conferred. Then the corporation would have an immediate right to the user of the land.

Such is not the case in this State.

Note the Pennsylvania statute on this subject. Brightly's Purdon's Dig. 1219, 1220.

Leaving out of consideration altogether the plain and express words of the charter of this respondent company, making the payment or deposit of the sum awarded the condition precedent to the vesting of right or title to the land, the provision of the Federal and the State Constitution requiring that private property shall not be taken except upon payment of the reasonable value of the same, it is quite clear that the Odessa & Middletown railway had no interest in the land covered by its

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first proposed route. This being the case, the contention of the complainant would present the anomalous condition of a railroad located (technically at least) on lands of persons who have absolutely no connection with the road or the charter under which it is proposed.

Now, if the owners of the land condemned by the first set of freeholders had a legal claim against the company for the damages awarded them in the first inquisition, it might with some show of reason be contended that the provisions of the Federal and State Constitution had been complied with.

Such, however, is not the case. The words of the Chancellor, in the case of *Wilson v. Baltimore & P. R. R. Co.*, 5 Del. Ch. 524, quoted above, show clearly that no such right did vest in those owners by reason of said inquisition.

In still further corroboration of this fact that no valid claim for the sums awarded vested in the landowners by reason of the inquisition and award, we cite the following cases in addition to those already cited; many of which are also directly on this point: *Stacey v. Vermont Cent. R. R. Co.*, 27 Vt. 29; *Chicago, Kan. & Western R. R. Co. v. Watkins*, 43 Kan. 50.

The value in the present case of authorities settling this question will be at once apparent.

No case in the books can be found whereby it has been determined that acts which confer no powers or rights, or fix no correlative liabilities, will exhaust the power of eminent domain. In order to hold that any act or acts will work such an exhaustion, there must be a reason therefor; and that reason must lie in some result flowing from the things done. For example, it

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has never, so far as we can learn, been held that a mere survey of a proposed route, independent of general or particular statutory provisions, will constitute a location so as to exhaust the power of further selection. A survey can have no such effect, simply because it fixes nothing on either side.

Now, if this be true with regard to the survey, why should a different result flow from the holding of the inquisition and the award thereon? Surely, only if something is fixed by those proceedings. As we have shown, however, such is not the case. The price is fixed, it is true, but that is all; and, as we have before stated, the fixing of the price in such a case is no more than if those landowners had bound themselves in any other manner to accept a certain price if the corporation would pay the same.

There being no reason, therefore, why the condemnation proceedings should have a different effect from the making of the survey, that different effect cannot be forced.

The holding that this respondent company had and has the right to select a route other than the first proposed can work no possible hardship. Its own charter renders it liable for the costs of the first inquisition, and the law is equally plain that any damages resulting to the landowners by reason of the first inquisition can be charged against it.

No principle of law of injunctions is more clearly established than that private persons, seeking the aid of equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. Even

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in cases of unquestioned nuisance, if the party complaining shows no special injury to himself different from the common injury to the public, he is not entitled to an injunction. In accordance with these principles, where it is made to appear after injunction granted that the injury suffered by complainant is sustained by him in common with every taxpayer, and the damage, therefore, is not special or peculiar, the injunction will be dissolved. And where the injury is doubtful and the evidence conflicting, the relief will be withheld. *High on Injunctions*, 291; *Harlan & Hol. Co. v. Paschall*, 5 Del. Ch. 435; *Biggs v. L. C. Co.*, 6 id. 267; *O'Brien v. Nor. & Worcester R. R. Co.*, 17 Conn. 372; *Bigelow v. Hartford Bridge Co.*, 14 id. 565; *Dawson v. St. Paul, L. & M. Ins. Co.*, 15 Minn. 136.

*WOLCOTT, CHANCELLOR.—The question involved is, has the Odessa & Middletown railway (after having a certain route for its proposed road surveyed, and condemnation proceedings instituted and damages assessed for certain lands along said route) the right to abandon this first route, to select another and different route running over a portion of the lands of the complainant, and to institute new condemnation proceedings on such altered route?

The statement of facts agreed upon, so far as it relates to the steps taken by the defendant company in connection with the first route selected for its road, contains the following:

* The Chancellor had intended revising the following opinion in some particulars, but was prevented from doing so by death. This revision was not, however, to in anywise alter or modify the conclusions arrived at, or the principles of law there laid down. J. L. W., Jr.

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“That the said defendant, * * * after numerous surveys, selected a route for the proposed railway and the line along which it intended to construct the same, provided the damages which might be assessed for the right of way when assessed did not exceed the amount which the said company felt able and willing to pay, and designated and staked out said line over the lands of those persons whose lands were crossed by its said proposed railway, drew plans and maps of the same for its own use showing the route, distance, widths, and grades of its proposed railway, and with the necessary data for its own use, and for the use of the commissioners and freeholders, who were afterwards called on to condemn certain portions thereof in viewing the lands to be condemned and ascertaining the damages to be awarded; * * *

“Fourth. That said defendant company agreed with certain of the owners of the lands through, over, and across which its said line was staked out and designated as aforesaid, for the purchase of and obtaining the lands and rights of way necessary for the purposes of constructing the railroad provided for by the said act, and the use of the said railway, but, having been unable to agree with all the owners of the lands, through which its said proposed line was to be constructed for the purchase of such lands and rights of way as were required for its purposes and the purposes of the said act, on the 27th day of August, A. D. 1889, applied as required by the said act first mentioned to the chief justice of the State of Delaware to appoint five judicious and impartial freeholders of said New Castle County to view the premises,” etc.

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The appointment of the commissioners is recited, and the statement then proceeds as follows:

“Fifth. That the said freeholders so appointed duly and properly qualified themselves, elected said Henry A. Nowland their chairman, and as required by the said act, condemned said lands and rights of way through and over said disagreeing owners, and on or about the 15th day of October, A. D. 1889, assessed the damages of the said landowners with whom said defendant company was unable to agree, fixing the amount * * * and notified said company of such awards, and the said company learning the amount of the said awards or assessments, declared that they, the said awards and assessments, were so large that the said company could not afford to pay the same, and that the said road or railway so selected could not be constructed by it, and none of the said amounts so assessed or awarded as damages have ever been paid, tendered, or deposited in the bank as required by said act. The facts respecting the notification of the company, and the circumstances relating thereto being as follows: Many or all of the landowners whose lands were to be condemned for the use of the said defendant were notified of the day, hour, and place of the meeting of the commissioners or freeholders by William R. Polk, representing the company, in the name of the said commissioners, and then and there appeared some in person and some by their attorneys, the said respondent being represented by said William R. Polk, and after viewing the lands of the said owners, respectively, and hearing the statements and arguments of the attorneys, landowners, and said William R. Polk,

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representing the company, and duly considering the same, the freeholders decided upon the awards aforesaid for the owners, respectively. And the said Nathaniel Williams, who had been made secretary of the said board, informed said William R. Polk that written notices of said award and the amounts thereof, should be given the landowners, respectively, and offered to furnish said Polk with a copy of a proper form in which said notices should be drawn, but said Polk, representing the said respondent, stated to the said Nathaniel Williams that it was no use to take the trouble of preparing and serving such notices, that the respondent could not pay the amounts awarded as damages by said freeholders or commissioners, as it had not enough money and the railroad could not be built on that line, and no one, either respondent or freeholders, gave or prepared any formal written notices of the awards to any of the landowners over whose lands said line was selected and to be constructed as aforesaid, and none of the said owners received the formal written notices provided for by said act, but all were present or represented, and had verbal notice of the amounts of respective awards as shown in the list appended to the bill of the said complainant, and so matters remained until the latter part of the year A. D. 1891, when the said company, without further grant or delegation to it of the right to exercise the right of eminent domain by the said General Assembly, applied the second time to his honor, the said chief justice, for the appointment of other freeholders as aforesaid to condemn lands and assess damages to owners along an entirely different route," etc.

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Section 6 of the charter of this defendant company (Chap. 513, p. 561, vol. 14, Del. Laws) provides as follows:

“ § 6. That the said company shall have power to survey, locate, and purchase such lands and rights of way within the limits of New Castle County as said company may deem necessary for this purpose, and in case said company shall be unable to agree with the owner or owners for the purchase of such lands or rights of way as may be required for the purpose of this act, the chief justice of the State of Delaware shall, upon the written application of the president of said company, appoint five judicious and impartial freeholders of said county to view the premises and assess the damages which the owner or owners will sustain by reason of the taking of the said lands and rights of way for the use of the said company. Before entering upon the premises, the said freeholders shall be sworn or affirmed, before some judge, justice of the peace, or notary public, faithfully and impartially to perform the duties assigned them, and they shall give five days' written notice to the occupant or owner of said premises, if within this State, and the same notice to the president of said company, of the time of their meeting upon said premises for the discharge of their duties; and the said freeholders, or a majority of them, shall certify their finding and award to both parties, whereupon the said company, upon paying the damages so assessed, or depositing the same in New Castle County National Bank of Odessa, to the credit of said owner or owners, shall become entitled to have, use, and enjoy said lands and rights of way for the purpose of said company forever. The expenses of

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the assessment of the said damages shall be paid by said company."

The contention of solicitor for complainant resolves itself into two propositions, by which alone his argument must stand or fall.

First. That the facts agreed upon constitute a "location," on the part of this defendant company, of their proposed road along and on the route so by them first selected; and,

Second. That the effect of a "location" is an absolute and total exhaustion of the power of eminent domain conferred by its charter and supplements.

Undoubtedly, a substantiation of these two propositions will make good the case of the complainant. On the other hand, however, it must be noted that the second is, in effect, a consequence flowing from and dependent upon the truth of the first. If, therefore, the first of these propositions be not clearly demonstrated, it will be entirely unnecessary to consider the second; for it is upon these two propositions taken together, and not singly, that complainant's case must rest.

In taking up the first of these propositions, I shall, at the outset, consider it in the light of reason, independent of any authorities or precedents, reserving the consideration of these latter for another portion of this opinion.

The facts relied upon as constituting a location are those regarding the inquisition and the assessment of the damages for certain lands along the route first selected. It is proper then to inquire why and how these particular facts should have such an effect.

It is quite certain that every act that was, or might have been, done by the Odessa & Middletown Railway

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did not, or would not, have produced such a result. For example, it is not contended that the survey alone amounted to a location.

It would seem to follow, therefore, that the act or set of acts which will constitute a location in the sense claimed must fix some right or establish some liability between the parties thereto. There can be no other reasonable ground for drawing such an effect from one or a series of acts, and not from another.

Does the inquisition, then, and the assessment of damages establish a right and a liability?

I take it to be the settled law of this State that the condemnation proceedings alone establish nothing, vest nothing, and fix nothing, except only the price at which the land inquired upon may be had from the proprietor by the corporation. It is true that the corporation may, after the inquisition, simply pay or deposit the price so fixed, and immediately the land becomes its property, with or without the consent of the owner; but this vesting of the title to the land by the mere payment or deposit of the damages assessed is not a result or consequence of the inquisition, but of the charter itself, for this is the power of eminent domain.

This distinction must be clearly and distinctly understood or confusion and sophistry will follow.

The effect of an inquisition in Delaware is reduced then to this, that it fixes the price at which the land may be had, nothing less and nothing more.

No right can be said to be vested, for the only right that exists (that of taking the land on payment or deposit) is, as I have said, the direct result of the legislative statute. Neither does the finding of the commis-

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sioners fix any liability. If any such were fixed, it would be, of necessity, the liability of the corporation to be sued by the proprietors and have judgment recovered against it for the assessed damages; but solicitor for complainant expressly removes this point from the case by insisting that his contention does not, in the least, involve such a liability.

What reasons then can be adduced for giving to so barren an act such a violent and far-reaching effect as to totally preclude the corporation from acting further under its charter in the selection of a route?

It was strenuously urged at the hearing that matters of public policy alone would be sufficient to cause such an effect; that otherwise, inquisitions might, and probably would, be indulged in *ad libitum* by corporations, for the sole purpose of "chaffering" with landowners for the cheapest route; and that the owners themselves would be oppressed by having their lands hung up in uncertainty, improvements stopped, at least temporarily, and themselves dragged into the expense and annoyance of attending the inquisition.

This plea can be briefly answered by stating that even if the liability of the corporation for all costs incurred in each condemnation proceeding which it abandons were not a sufficient safeguard against mere capricious bargaining, then certainly its other and further liability for all damages and expenses reasonably incurred by the landowners by reason of the inquisition would be a sufficiently strong and high one. The fact that such a liability on the part of the corporation abandoning an award does exist will, I think, be conclusively shown by

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the authorities hereafter considered, if it be questioned at all.

I know that it is urged that grants of eminent domain must be strictly construed against the grantee.

This principle is too well settled to admit of questioning. Eminent domain is a power so closely akin to sovereignty that, in a country such as ours, there is always a present necessity for its most careful and vigilant guardianship, although it is submitted that close vigil should be maintained rather in the legislative halls than in the tribunals of the courts.

Admitting this principle, however, in all its force and vigor, it nevertheless does not and should not entail an interpretation which seizes upon meaningless excuses and makeshifts with which to exterminate the power given by the people themselves through their immediate representatives.

Why was the power of eminent domain permitted to be delegated, since it might so easily have been entirely withheld? Simply because it is recognized, well-nigh universally, that its delegation is conducive and necessary to the public good.

Take, for example, any railway corporation, such as this defendant company. The grant of eminent domain, it will not be contended, was made to it simply that the private individuals who make up its organization might profit thereby. The power and the grant itself were conferred because the public were known to have a vital concern in the project for which the corporation was designed.

This being true, it follows that every senseless interpretation which virtually annihilates the power con-

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ferred is an obstacle in the path of public improvement and inimical to the public interest and well being.

The people, by their Constitution, have made the General Assembly the sole judges of the wisdom or utility of conferring upon corporations this high power, and, therefore, every charter which comes to our courts for construction comes sealed with the seal of popular approval and conclusively vouched for as a matter of public good and public importance.

I have dwelt thus at length upon the interpretation of the principle of law contended for, not as reflecting on or questioning its authority, which I have expressly admitted, but simply to show that it cannot be employed causelessly.

Returning now to the effect of the condemnation proceedings, and assuming that I have shown that the effect is nothing more than if the landowners themselves had bound themselves to take a certain price for their property if the same were paid or deposited to their order, I can see no sound reason for holding that the inquisition amounted to a location.

I shall proceed now to consider the authorities produced upon both sides to see how far they harmonize, or are discordant, with the opinion expressed.

It will, of course, be noted that only those authorities where the statutes and charters are analogous, on the main points involved in this controversy, with those in our own State, can be of any relevancy. I have, therefore, spared no pains to investigate the laws of those States from which cases have been cited, so far as they lay in my command.

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An examination of the public statutes of Pennsylvania will demonstrate the inapplicability of cases arising in that State after the survey of a proposed railway route by the viewers, as they are called, to the case in hand.

The powers and limitations of the Odessa & Middletown railway are to be found within the four corners of its charter and the supplemental act thereto, and only there. The cases in Pennsylvania, on the other hand, are controlled by the general statute regulating the construction of railroads. By the terms of the charter of the corporation before me, the action of the commissioners appointed to lay out a route for the company binds no one until the damages assessed by them are paid or deposited by the company. In Pennsylvania, no payment or deposit is made a condition precedent, but the action of the viewers alone becomes, when confirmed by the court, a judgment exactly like a judgment in case of a debt, and execution may issue upon it in precisely the same manner. With such a difference between the laws, it can hardly be insisted seriously that any analogy can be drawn.

The language of the Pennsylvania statute is as follows:

“§ 35. When the said company” (railroad) “cannot agree with the owner or owners of any lands or material for the compensation proper for the damage done, or likely to be done, to or sustained by any such owner or owners of such lands or materials, which such company may enter upon, use, or take away, in pursuance of the authority hereinbefore given, or by reason of the absence or legal incapacity of such owner or own-

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ers, no such compensation can be agreed upon, the court of common pleas of the proper county, on application thereto by petition either by said company, or owner or owners, or anyone in behalf of either, shall appoint seven discreet and disinterested freeholders of said county, neither of whom shall be residents or owners of property upon or adjoining the line of such railroad, and appoint a time not less than twenty nor more than thirty days thereafter, for said viewers to meet at or upon the premises where the damages are alleged to be sustained, of which time and place ten days' notice shall be given by the petitioner to the said viewers and the other party; and the said viewers, or any five of them, having been first duly sworn or affirmed faithfully, justly, and impartially to decide, and true report to make concerning all matters and things to be submitted to them, and in relation to which they are authorized to inquire in pursuance of the provisions of this act, and having viewed the premises, they shall estimate and determine the quantity, quality, and value of said lands so taken or occupied, or to be so taken or occupied, or the materials so used or taken away, as the case may be, and having a due regard to, and making just allowance for the advantages which may have resulted, or which may seem likely to result to the owner or owners of said lands or materials, in consequence of the making or opening of said railroad, and of the construction of works connected therewith; and after having made a fair and just comparison of said advantages and disadvantages, they shall determine and estimate whether any, and if any, what amount of damages has been or may be sustained, and to whom payable, and make report

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thereof to said court; and if any damages be awarded, and the report be confirmed by the said court, judgment shall be entered thereon; and if the amount thereof be not paid within thirty days after the entry of such judgment, execution may then issue thereon, as in other cases of debt, for the sum so awarded, and the costs and expenses incurred shall be defrayed by the said railroad." Brightly's Purdon's Dig. 1219, 1220, Act Feb. 19, 1849.

The sanctity thus given to the report of the viewers, when confirmed, in making it a judgment, is expressly noted in the case of Neal et al. v. Pittsburgh & Connellsville R. R. Co., 2 Grant's Cas. (Penn.) 137, cited by solicitor for complainant.

The facts in this case are as follows:

On the 28th day of June, 1854, the defendants in error presented their petition to the Court of Common Pleas of Allegheny County, in proper form, with the proper allegations, accompanied by the proper diagram, and prayed for the appointment of viewers to assess the damages, *inter alia*, upon the lands of plaintiffs in error. Viewers were appointed, performed their duties, made their report, awarding the plaintiffs in error \$1,500, which report was confirmed, and judgment entered thereon December 23, 1854. *Fi. fa.* was issued to December Term, 1854, and returned *nulla bona*. *Alias fi. fa.* was issued to March Term, 1855, and levy made on personal property of defendants. January 9, 1855, at the instance of defendants, a rule was granted to show cause why the *alias fi. fa.* should not be set aside for the reasons, substantially, that the railroad company had not entered upon the said lands or signi-

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fied their intention so to do, and because they in fact did not intend to take the said lands, but to select another route than that so laid out.

Lowrie, J., in delivering the opinion of the court, said:

“When they” (the damages) “have been ascertained by report and judgment thereon, the judgment settles the right of the landowner to such damages, just as completely as any other judgment, and he has just the same right to execution upon it. He is not to wait until the company say they are ready to go on, else all improvements by the owners of property along such a route must be indefinitely suspended upon a contingent appropriation. If judgments are to be the end of strife, they must bind both parties; and the power of taking any man’s land is exhausted by a location which it is too weak to retain; it cannot be indulged with another choice.

“Here the petition to settle the damages is filed by the company, and they say that they have located their road over the land for which these damages are assessed. A report having been made and judgment entered thereon, it is a final judgment, entitling the party to execution. If the company have any equitable ground of relief, they must present it in some other form than a mere motion to set aside a regular execution.”

By comparing the language of the charter of this defendant company with that of the Pennsylvania statute, the difference in effect between the report of the commissioners in the one and of the viewers in the other case is significantly apparent.

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Section 6 of the charter of the Odessa & Middletown railway (Vol. 14, Del. Laws, 561) is as follows:

“ § 6. That the said company shall have power to survey, locate, and purchase such lands and rights of way within the limits of New Castle County as said company may deem necessary for their purpose, and in case said company shall be unable to agree with the owner or owners for the purchase of such lands or rights of way as may be required for the purpose of this act, the chief justice of the State of Delaware shall, upon the written application of the president of said company, appoint five judicious and impartial freeholders of said county to view the premises and assess the damages which the owner or owners will sustain by reason of the taking of the said lands and rights of way for the use of said company. Before entering upon the premises, the said freeholders shall be sworn or affirmed, before some judge, justice of the peace, or notary public, faithfully and impartially to perform the duty assigned them, and they shall give five days' written notice to the occupants or owner of said premises, if within this State, and the same notice to the president of said company, of the time of their meeting upon the premises for the discharge of their duties; and the said freeholders, or a majority of them, shall certify their finding and award to both parties, whereupon the said company, on paying the damages so assessed, or depositing the same in New Castle County National Bank of Odessa, to the credit of said owner or owners, shall become entitled to have, use, and enjoy said lands and rights of way for the purpose of said company forever.”

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It will be noted that no provision is made herein for the return of the proceedings or finding of said commissioners to the court, nor any confirmation thereof. The Pennsylvania statute makes the finding of damages by the viewers, when confirmed, a judgment of the court in favor of the owner of the land. But there could not be a judgment for the amount of the damages assessed unless the title to the land became vested by the return and confirmation in the railroad company. In short, the vesting of the title to the land is the consideration of the judgment. In the charter of this defendant company, a condition precedent to the vesting of the title is expressly made, and a condition moreover which the company itself is to perform, namely, the payment or deposit of the damages so assessed. In the one case, the vesting of the title is immediate and independent of any action of the railroad; in the other, no right vests without a payment or deposit. Until the Odessa & Middletown railway had made the payment or assessment, an entry by them upon the lands of this complainant would have rendered them liable as trespassers.

If other authority than the express words of the charter of this defendant company were required to demonstrate the radical difference between the effect of an inquisition and award in the State of Pennsylvania and in Delaware, it could be abundantly had in the ruling of the late Chancellor Saulsbury in the case of *Wilson v. Baltimore & P. R. R. Co.*, 5 Del. Ch. 524.

On page 542 of the opinion, the Chancellor say "The commissioners are authorized to render no judgment either against the person or the thing. They assess damages. They make an award which binds

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nothing. No execution or process can be issued thereon, and no proceedings can be taken under it until the money is paid or deposited as the act prescribes."

Both by the facts and the principles of law laid down in the opinions of the court, the two remaining cases cited by the solicitor for the complainant from Pennsylvania are substantially differentiated from the cause now under consideration.

In *McMurtrie v. Stewart*, 21 Penn. St. 325, Black, Ch. J., says:

"This was trespass for entering plaintiff's field, taking down his fences and injuring his crops. The defense is that one of the parties sued was supervisor of the township where the alleged injury was done, and went there himself, taking two of the others along as assistants, for the lawful purpose of opening a public road laid out by order of the Court of Quarter Sessions. The plaintiffs in error have furnished us a few meagre extracts from the evidence. But from these, and from the facts stated in the charge, we infer that the road in question was laid out many years ago (how many we cannot tell), and that it was opened at least seven years before the time when the wrong complained of in this suit was committed. From 1837 to 1844, the road was used and kept in repair by the public. But it is now asserted that it was opened on the wrong ground — that the location agreed on by the viewers was through the plaintiff's field, whereas the supervisors of 1844, when they opened it, carried it around the field by way of a private road, which had been previously used. It was under pretense of correcting this error that the defendants entered on the plaintiff's land."

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Under such a statement of facts, it can scarcely be a matter of surprise that the learned judge decided that the supervisor defendant had long since exhausted his authority as to the laying out of the road, and was a mere trespasser in his subsequent action. To attempt to force an analogy between this case and the one now before me would be to willfully ignore the striking difference between the mere survey of a route, and a survey with an actual user for many years.

But the following extract from the opinion of the court will still further demonstrate the inapplicability of the McMurtrie case to that of the Odessa & Middletown railway. "Besides, one who is really aggrieved by the opening of a road on ground not intended by the viewers, may have it altered by a petition to the court, and the appointment of new viewers." Page 326 of the opinion.

Here is an express ruling of the court as to what is intended by the statement that the location of the road exhausts the power to relocate or alter. The exhaustion of such a power is confined to the set of supervisors who first acted, and the court positively asserts the right to a new petition and the appointment of new viewers and supervisors who would have the power of relocation and alteration.

If this defendant company based its claims to a change of route upon a subsequent action of the first commissioners, there might be a point of similarity in the two cases. As a matter of fact, however, it did present a new petition to the chief justice, and new commissioners were appointed.

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The case of *Morrow v. Commonwealth*, 48 Penn. St. 305, is a case in which the facts are substantially similar to those in *McMurtrie v. Stewart*, and the ruling of the court in the former goes no further than in the latter.

In the case of *Blakemore v. Glamorganshire Canal Navigation Co.*, 1 Myl. & K. 154, the main question in dispute was whether the defendant, who had been authorized to construct a canal, the dimensions of which were not specified, could, after the canal had been completed, of a certain width, widen the same.

Lord Eldon, in the course of his opinion, said:

"But, if that is done, and the canal is completed in the sense which the act of Parliament means by the word *completed*, and the sense put upon the word by these defendants themselves (as is shown by their going about to levy their tolls on the whole course of the canal), and if, notwithstanding, they may afterwards widen and deepen the canal, what is there to hinder them from carrying it from sea to sea? Why, there would be no end of it. When the canal is completed, the powers of the company are exhausted, and in making the canal, the proprietors are not at liberty afterwards to injure the interest of parties by making what is quite a different canal."

This reasoning of Lord Edon, which is certainly most pertinent and cogent in the cause before him, would lose all of its force and application if it had been uttered under a statement of facts like that which has arisen in the matter now before me.

As a matter of fact, however, no English case can be taken as authority in this State, simply because the method of procedure in the taking of lands for public

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or *quasi* public purposes differs materially from that in Delaware.

In England, the particular route is set forth by metes and bounds, courses and distances, at the time of the application to Parliament for the charter. The charter is then granted for that particular route. This difference alone would render the English cases inapplicable, since it is not contended, but that the specification in the charter of the exact route proposed would definitively limit the corporate power of eminent domain conferred by that instrument.

The difference does not, however, stop even here. After the charter is granted, notice is given to the property-owners along such route; with an offer of a price; this offer is accepted or refused with a counter offer; a jury then tries the question of price, and their verdict is registered as a conveyance of the title to the land in question.

In the case of *Morris & Essex R. R. Co. v. Central R. R. Co. of New Jersey*, 31 N. J. L. 205, the facts were as follows:

The defendant for many years, and prior to the location of the plaintiff company at Phillipsburgh, owned a railroad beginning at Elizabethport, and extending to the Delaware river, at Phillipsburgh. On the 29th of May, 1860, the plaintiff filed a survey in the office of the secretary of state of New Jersey, under their charter and its supplements of a route for the extension of their railroad from Hackettstown to the Delaware river, and in December, 1863, they purchased certain lands in Phillipsburgh on the line of said route and adjoining lands of the defendant, upon which, as early as the

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1st of April, 1864, they constructed the roadbed of their said railroad. Afterwards, on the 24th of March, 1864, the defendant filed in the office of the secretary of state a survey or location of a part of the Central railroad in the village of Phillipsburgh, the route of which survey crossed the before-mentioned location of the extension of the plaintiff's line. Subsequently the defendant presented a petition for the appointment of commissioners to examine and appraise the land so by them intended to be taken from the Morris & Essex Railroad Company, and to assess the damages sustained by the latter company by taking said land.

The petition was resisted on the ground that the Central Railroad Company had long since constructed and entirely completed their road and had continued in operation over it for some time, and that the only object of the petition was to build a branch or spur to the line so already laid out and constructed. The court held that they had no right to do this on the ground that the former construction and operation over the other route or roadbed exhausted their power to locate a line without another grant of the right of eminent domain.

In the case of the State of Connecticut v. The Norwalk & Danbury Turnpike Co., 10 Conn. 157, a recital of the facts, as set forth in the brief of the solicitor for the complainant, will of itself effectually reveal the absence of any analogy to the cause in hand.

The Legislature, in the charter for a turnpike company, empowered the proprietors to erect and establish a toll-gate on their road in the most convenient place, to be by them determined. In 1796, about a year after the grant, they erected and established a gate at a cer-

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tain place on the southerly portion of their road, that being determined by them to be the most convenient place. It was removed afterwards from time to time, and place to place, until it was located, in November, 1831, at a certain point on the northerly portion of their road. In May, 1832, the Legislature incorporated another turnpike company on the petition of the proprietors whose road intersected the northerly portion of the first-mentioned road, between the last location of the gate. In the charter of this company, it was proved, that the first-mentioned company should not thereafter maintain a gate on their road southerly of said point of intersection; but that they should have the right at all times to maintain a gate on their road at any place southerly of said point of intersection, agreeable to the terms of their original charter.

On an information in the nature of a *quo warranto*, filed in December, 1831, and continued until 1833, complaining of the location of the gate in 1831, it was held that the erection and construction of the toll-gate at the point first selected by the company was an exhaustion of their power to erect and construct under their charter.

The opinion of the court in that case goes no further than this ruling of a certainly well-established principle of law. It can hardly be thought necessary to point out particularly the difference between the ruling in this case and the one before me, where no construction or user has ever existed.

The case of The Hartford, New London, Windham & Tolland County Society for Establishing a Turnpike Road from the City of Hartford to the City of Norwich

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v. Hosmer, 12 Conn. 360, arose under a state of facts substantially like that presented in the case in 10 Conn., just referred to. Here, also, there had been an erection, construction and user of a toll-gate at one point, and a subsequent attempt to change to another point.

The court make practically the same ruling as in the former case, that the first erection, construction and user worked an exhaustion of their power under the charter.

The case of Morehead et al. v. The Little Miami R. R. Co., 17 Ohio St. 340, may be disposed of by simply stating that the ground of that suit was an effort to relocate a line of railway after a construction and operation of over five years over another route; and that there is no ruling in the opinion of the court hinting, either directly or inferentially, at a state of facts like that now under consideration.

The case of The Little Miami R. R. Co. v. Naylor, 2 Ohio St. 235, may be disposed of in a few words, so far as this cause is concerned, by stating that the sole question before the court was as to the right of a railroad company, already constructed and in operation, to change its tracks to another portion of a public street. The term "location," as used in this opinion, refers particularly and exclusively to a location caused by an actual construction. In fact, the court goes so far in the opposite direction from that for which it was presumably cited by complainant's solicitor, as to make a distinction between the change of a route *before* construction, and a change *after* construction, and to call the former merely a "change of selection," while the latter only is designated as a change of "location."

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In the case of Brock v. Old Colony R. R. Co., 146 Mass. 194, a recital of the facts causing the controversy, together with a few quotations from the charter of the defendant, and from the general statutes of Massachusetts, will conclusively demonstrate its inapplicability to this cause.

The facts are as follows:

Writ of entry, dated October 1st, 1886, to recover a parcel of land in Stoughton.

The facts agreed on were, in substance;

On September 27th, 1854, the plaintiff owned a tract of land in Stoughton, which was bounded on its easterly side by land of O. Ames & Son. The Easton Branch R. R. Co., to whose rights and liabilities the tenant has succeeded, was incorporated by the statutes of 1854, chapter 55, and on September 27th, 1854, filed the location of its road in the office of the County Commissioners of the County of Norfolk. A plan accompanied, and was made a part of the location. By such location and plan, the demandant's name did not appear as one of the persons whose land was taken in and by the location, though the name of O. Ames & Son did so appear; but by an application of the monuments, boundaries, courses, and distances given in the plan and location to the land itself, it appeared that the demanded premises were included in the location.

The Easton Branch R. R. Co. afterwards constructed its road over the land described in its location, but did not before doing so furnish the demandant with a plan of his land included in its said location, nor did the plaintiff request such a plan. The Easton Branch R. R. Co., or the tenant, did not fence or enter into actual

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occupation of the demanded premises until the year 1879 (seven years before the date of the writ of entry), since which time the tenant has been in actual occupation against the objection of the demandant, who up to that time had no actual knowledge that any of his land was included in the location, nor any notice of that fact, except such as was given by the filing of the location. The demandant has never parted with his title to the demanded premises, except as herein stated, nor did the Easton Branch R. R. Co., or the tenant, ever pay the plaintiff any damages or compensation for the taking of his land.

By the charter of the E. B. R. R. Co., the assignor of the tenant (Acts and Resolves of Massachusetts, passed in 1854, chap. 55), the corporation is expressly made subject to the restrictions and provisions set forth "in the thirty-ninth chapter of said" (revised) "statutes, relating to railroad corporations."

Sections 46, 47 and 48 of said chapter 39 are as follows:

"§ 46. No petition for the establishment of any railroad corporation shall be acted upon, unless the same is accompanied and supported by the report of a skillful engineer, founded on actual examination of the route, and by other proper evidence, showing the character of the soil, the manner in which it is proposed to construct such railroad, the general profile of the surface of the country through which it is proposed to be made, the feasibility of the route, and an estimate of the probable expense of constructing the same."

"§ 47. No such petition shall be acted upon, until notice of the pendency thereof shall have been pub-

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lished according to law, which notice shall designate the intended route with such certainty as to give reasonable notice to all persons interested therein, that their rights may be affected by the granting of said petition, and that they may have an opportunity to appear and object thereto; but the provisions of this and the preceding sections shall not prevent the Legislature from requiring surveys, plans, and further estimates in any case, when they shall judge proper."

"§ 48. *Every act of incorporation for a railroad company shall confine the road within the limits, indicated by the notice required in the preceding sections, shall specify the several towns through which the same may pass, and shall otherwise designate the route, on which the road may be authorized to be made, with as much certainty as the nature of each case will admit.*"

In section 5 of the charter above referred to, it is further provided that:

"If the *location* of the road as provided for in the second section, be not *filed* according to law, within one year, and if said railroad be not completed within three years from the passage of this act, then this act shall be void."

In section 75 of chapter 39 of the general statutes referred to above, it is stipulated that:

"§ 75. Every railroad corporation shall, in all cases, file the location of their road within one year with the commissioners of each county through which the same passes, defining the courses, distances, and boundaries of such portion thereof, as lies within each county, respectively."

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Here again it will be seen that we are presented with a case where the company is bound by law to indicate its particular route and to file the same in certain public offices before it can take one step towards the consummation of its design. This indication of the route and the filing thereof is expressly made its location by positive *legislative* enactments. It is made as much a part of its charter as if that instrument had set forth the route specifically and particularly by boundaries, courses and distances.

The entire absence of any such statutory or charter provisions in the case of the Odessa & Middletown Railway breaks down every point of analogy which otherwise might have existed between it and the case cited.

In the case of *Brigham v. The Agricultural Branch R. R. Co.*, 1 Allen (Mass.), 316, there is some ambiguity in the statement of facts which lends a doubt as to the application of some portions of the ruling of the court.

The general facts as stated were, that the defendant, by its act of incorporation, was authorized to construct its line from a point in the Village of Northborough to one in that of Southborough; this line, however, to pass to the northward of the lands of Willard Newton and at a point in the southerly portion of the Village of Marlborough; thus limiting the general bearing of the route. In the location of its line, the defendants first went in a direction which would have brought them to the south instead of to the north of Newton's land, but attempted to bring their road within the provisions of the charter by making a wide curve, which brought them to the north of the land, from which the road, by an acute

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angle, was continued to Southborough. Afterwards, a spur was constructed northerly from the point of this angle to the Village of Marlborough, a distance of about a mile and one-half, passing over the land of the plaintiff.

The court, on page 318 of the opinion, say in reference to this spur or extension:

“ This extension was, after the junction of the tracks upon the land of Newton, wholly unnecessary to perfect the line of travel and transportation between Northborough and Southborough, and must consequently be considered as having been made without any authority whatever.”

The court decided the “ extension ” of the road over plaintiff’s land to be illegal. The irresistible inference from the facts and various portions of the opinion is that the grounds of this decision were:

1st. Because that “ extension ” was made *after* a road, constituting a complete route or line between the points of commencement and termination, as set forth in the charter, had already been constructed; and,—

2d. Because the road so already constructed covered the real purpose and design of the act of incorporation, and the “ extension ” over plaintiff’s land would be in the nature of an unauthorized addition to an already complete route between the termini specified in the charter.

The remarks of the court in this case, therefore, to the effect that a location once made exhausts the power in the company to a choice of routes, must be taken as applying to a state of facts analogous to that before it, and hence are clearly inapplicable to the present cause.

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It is difficult to conceive how any ruling of the court in the case of the Boston & Providence Railroad Corporation v. Midland R. R. Co. and others, 1 Gray (Mass.), p. 340, can affect the decision of this cause at bar. The facts therein, and the opinion of the court thereon, involve simply and solely the interpretation of certain sections of the General Railway Statutes of Massachusetts, for which there are absolutely no counterparts in this State, and no *dictum* of the court can, with any show of reason, be distorted into a general principle independent of the existence of the peculiar and particular provisions of those general statutes.

The Revised Statutes of Massachusetts, chapter 39, section 75, provides that:

“Every railroad corporation shall, in all cases, file the location of their road within one year, with the commissioners of each county through which the same passes, defining the courses, distances and boundaries of such portions thereof, as lies within each county respectively.”

The defendant company had obtained a charter from the Legislature, in which its proposed line was not described with any more particularity than that it should be laid between two points or termini. Subsequently, however, and acting in accordance with the provisions of the section quoted above, it filed a map of its proposed road (which the statute expressly calls a “location”), describing its course specifically and definitely. Still later, and before the actual construction of the road-bed, the defendant company filed a new map under the title of “an amended location,” with the proper county

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commissioner, by which the route of its railway was altered materially, although the termini remained as fixed in its charter.

The main question considered by the court was, whether such alteration was legal.

Revised Statutes, chapter 39, section 73, provides that:

“Any railroad corporation, *after having taken lands* for any portion of their road, may, if they shall find it expedient, vary the direction of the road in the place where such land is situated; provided, they shall not thereby locate their road, or any part thereof, without the limits prescribed by their act of incorporation; and they shall, before the time required by law for completing their road, file the location of the different parts of the road, where such variations are made, with the commissioners of the respective counties, where said parts of the road are situated, or with the mayor and aldermen of the City of Boston, as the case may be; and provided, also, that the time allowed for completing the whole road, shall not be extended in consequence of such variation.”

The court proceeds to interpret these two sections together, and concludes that the intent of the whole act is that the filing of the map or “location” is, in effect and actually, a taking of the land by the corporation such as estops the private owner from denying its title thereto, and which gives the former owner a right to recover from such corporation the damages for, or value of such land so constructively taken.

It is to be conjectured that counsel for complainant in the cause before me, relied upon this ruling as hav-

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ing such general bearing on railroad companies, outside as well as within the State of Massachusetts, as to make the action of the Middletown & Odessa Company in the appointment of commissioners and their assessment of damages, of like reach and effect.

It is, however, upon the peculiar phraseology of various portions of the Massachusetts statutes, and particularly the words which I have italicized in the quotation from section 73 thereof ("after having taken lands"), that the opinion in Gray on this point is exclusively based. Nowhere can ingenuity discover even a hint that such a ruling would have prevailed in the absence of express legislative intent. On the contrary, the court even refer to another portion of the act which specifically confers upon the individual owners of land both on the original and altered route, the right to recover damages for the constructive, or the actual taking.

The opinion concludes by upholding the right of the defendant company to alter its course, but, basing this decision upon the express legislative right of such alteration.

In the case of *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush (Ky.), 529, a mere quotation from the first part of the opinion, containing a statement of the facts, will easily reveal its inapplicability to the cause now under consideration.

On page 531, the court say:

"The Bank Lick Turnpike Company was incorporated by act of assembly, approved February 6, 1839, with authority to construct a road between certain designated points, and to hold, use, possess, and occupy all such real and personal estate as might be necessary and

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convenient for the site or route of said road." * * *
"Under this charter, the company selected a route for its road, acquired the right of way, and constructed the road and opened it to public use, and continued to maintain and keep it in repair, and to collect toll for many years."

The turnpike company afterwards abandoned a certain portion of its road to a railway, upon payment of a money consideration by the latter, and a deed of another piece of ground.

The court, on page 535, say:

"We think it equally clear that unless the amendment in question has been accepted, the company had no authority voluntarily to change the location of its road, as was done in this case, and then to charge toll under its original charter for the use of the new road. Having once exercised its choice, in the location of its road, it was bound to keep the road as thus located in repair, unless prevented by some *vis major*, or by the lawful appropriation of its road, or a part of it, by the public."

Not only, beyond question, must the term "location," as used, have been intended to apply solely to the facts before the court — an actual construction and operation for many years — but also to the peculiar case of a turnpike company which has abandoned and failed to keep in repair for a year a part of its road, and then strives to collect toll under its old charter over a new piece of ground.

In the case of *The People v. New York & Harlem R. R. Co.*, 45 Barb. 73, also cited by solicitor for complainant, there is even less of similarity between the

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facts considered and those giving rise to the cause before me.

The defendant had been given the right, by legislative enactment, to build a single or double track on certain streets and between certain points. A subsequent statute gave it the right "to extend" its course. The defendant did, in fact, build its road in accordance with its powers under the first act, and proceeded to operate its cars upon the line so laid out. Afterwards, it attempted to build other tracks, not as extensions, but as branches of its original line, and to operate them not instead of, but in connection with, its first line.

The whole question was as to the construction of the amendatory statute, and especially with regard to the word "extend," as used in that act. The court held that "to extend," meant to continue or prolong its course, and not to build independent branch roads.

It will be seen, therefore, how great is the dissimilarity between the facts in the 45 Barb. case and those now before me. In the former, the attempt was to build a distinct road in connection with one already constructed and operated; in the latter, there has been no construction, no operation, and no effort to acquire the right to the user of more than one road.

The solicitor for the complainant lays down the principle that:

"The power of eminent domain delegated by a legislative enactment, is exhausted after one exercise."

In support of this proposition, he cites, among others, the case of Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358.

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If it is desired to bring the Odessa & Middletown railway within the meaning and effect of the proposition quoted, it is incumbent on the complainant to show that the action taken by that company, as set forth in the statement of facts agreed upon, did amount to an exercise of the right of eminent domain. Yet certain it is that neither from the facts nor from any of the rulings of the court can any points of similarity be drawn from the case in 32 Barb. to that of the Odessa & Middletown railway.

The facts in the case cited are substantially as follows:

The defendant had acquired a charter permitting it to use certain streets for the construction of its road upon obtaining the consent of the common council. This consent it did obtain, with certain conditions annexed, such as paving the streets at certain portions, building bridges, etc. It complied with these conditions at the expense of large sums of money.

The plaintiff claimed the right to the use of the tracks of the defendant on a certain street, because it was the assignee of the franchise of the Brooklyn-Jamaica Company, which latter company, it claimed, had such a right.

The Jamaica Company was incorporated by an act of the Legislature, passed April 25th, 1832, with the right to construct a railroad, commencing at an eligible point within the Village of Brooklyn, and extending to any point within the Village of Jamaica, with lateral railways to the Villages of Flatbush and Flushing. The grant was not to commence at several points, but at one point in Brooklyn. It was not to ramify itself through

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the several streets of the city at any or all times thereafter, but to run from the one point direct to another point in the Village of Jamaica. The company accordingly located its western terminus at the foot of Atlantic street, and its eastern in the Village of Jamaica, where they have ever since remained.

It never had used the street which formed the bone of contention in the case, but had laid its tracks on other streets, and had for a number of years operated its cars on the tracks so laid out.

Under these facts, the court ruled that:

“Having made its location, and adhered to it for many years, it is concluded by what has been done.”
Pages 365, 366 of the opinion.

The above quotation comprises the complete ruling of the court upon the subject of location and the exhaustion of the power of eminent domain. It will thus be seen that the opinion goes no further than deciding that the actual construction of a railway, and its operation as such for many years, is a location and an exhaustion of the power to alter or change its route.

In the case of *Mason v. Brooklyn City & Newton R. Co.*, 35 Barb. 373, the solicitor for the complainant only quoted certain extracts from the opinion of the court, to be found on page 381. The quotation is as follows:

“It is undoubtedly true, as contended by the learned counsel, that when a corporation chartered for the purpose of constructing a railway, has located its line, it cannot change the location and adopt a new route, unless the power to do so is expressly granted in its charter, and then only in the manner indicated. This is

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upon the plain principle that when the power thus conferred upon a company has once been exercised, it is exhausted. When authority is given to locate and construct a road, upon a route to be indicated in a certain manner, that route, when thus indicated, is in effect incorporated in the charter — as if the authority thus conferred were expressly and distinctly confined to the precise route laid down in the subsequent proceedings of the company — and the powers of the company are as finally and effectually limited to that precise line of road, as if such were the express provision of the charter.”

I have quoted thus at length in order that every line and word of the opinion which can possibly be strained to have any bearing upon the point contended for by the solicitor, may be clearly and fully brought up. There is no other portion of the opinion which even hints in this direction.

If the language quoted is analyzed, it will be found that its denial of the power of a company to change a proposed route is expressly limited to two classes of cases:

1st. When it has *located* its road; and,

2d. When, by the terms of the general statute, or by its charter, authority is given to a company to locate and construct its road *upon a route first to be indicated in a certain manner by the company.*

Now, as to the first class of examples thus laid down, it is only necessary to say that their applicability to the case under consideration hinges solely and entirely upon the meaning of the word “location,” which word is not defined by the court.

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If, by the steps taken by the Odessa & Middletown Railway, that company has indeed located its road in the strictly technical intendment of the term, this *obiter dictum* (for it is nothing more) may be said to apply; but without a demonstration of such location by this defendant company, it certainly cannot.

The second class of examples brings us, if possible, still fewer rays of light. It will hardly be contended that there is anywhere to be found in the charter of this defendant any provision requiring it first to determine in some certain manner the route which it is to locate upon. Without such a provision, however, this second class is plainly inapplicable.

A statement of the facts in this case will be found, however, most clearly to negative any fancied analogy to this cause.

The defendant was a railway company deriving all its powers and franchises from the general statute of New York regulating railroads; not having a charter of its own.

By the provisions of this general statute, certain differences were made, in regard to requirements, between railways whose tracks began and ended within a city's limits, and those extending outside the limits.

The statute also provided, *inter alia*, that a map showing the route, its courses and distances, should be filed with the clerk of the county before the construction of the road.

The defendant did file a map, which, however, was entitled a map of a *portion* only of its route, in which the termini of the road was marked as Newton within the limits of Brooklyn. As a matter of fact, there was

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both a Township of Newton, which was within the Brooklyn limits, and a Village of Newton, which was without those limits. The articles of association of the defendant described the terminus of the road to be the Village of Newton, and it acquired its franchise under the statute with that idea or understanding.

The plaintiff claimed, however, that the map which was filed having only shown its route to a point short of the city limits, the defendant was bound by that step, and could not extend its line further. The question of the alteration of the course did not enter into the consideration of the case, inasmuch as there was a specific power under the statute for the changing of the course with the consent of the directors and the common council. The particular fact in the case was that such a change of course had really been made under the statute. The point raised was as to the power of the company to extend its termini beyond the point set out in the map. If it could not do this, it fell under the provisions of the statute governing railways whose tracks were circumscribed by the city limits.

The court very properly ruled that the map could not prevail against the express provisions of the association under which the franchise of the company was acquired.

With such a statement of facts, it will be readily seen that the court in this case were considering a totally different question from that now before me, and that it could scarcely have been intended that the language of the opinion should be stretched beyond a state of facts analogous to those before it.

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The case of *The Hudson & Delaware Canal Co. v. The New York & Erie R. R. Co.*, 9 Paige (N. Y.), 323, will be found to fall within the second class of cases referred to in the 35 Barb. case, just alluded to.

The plaintiff sought to restrain the defendant from constructing its railway along the borders of plaintiff's canal. One of the grounds raised by plaintiff's solicitor, and the one mainly considered by the Chancellor, was whether the construction of the road along the canal would constitute a change or alteration of the course or line of the defendant railway previously surveyed and marked out by it.

Thus far in the statement of facts, there is an apparent analogy to that in the *Odessa & Middletown Railway*, but an examination of the charter of the *New York & Erie R. R. Co.* will disclose the point of divergence which really exists.

By the fourth section of the original act of incorporation of the *N. Y. & E. R. R. Co.* (Laws of New York of 1832, page 404), the directors, after their examinations and surveys had been completed, were to select, and by certificates under their hands and seals, to designate the line, course, or way, which they should deem most advantageous for their railroad, and to file one of such certificates in the office of the register of the City of New York, and one in the clerk's office of each of the counties through which the railroad should pass; which line, as thus designated, was to be deemed the line on which the corporation should construct its road.

By this provision of its charter, it will be seen that the ruling of the court in the 35 Barb. case clearly applies to it; and as the court said in that case, the certifi-

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cate of the course or line of the road became as if it were embodied in the original charter.

No language even remotely resembling that of the provision referred to, can anywhere be discovered in the act creating the defendant company now before me.

The court, as a matter of fact, decided, in the 9 Paige case, that the construction of the road along or near the canal would not constitute a change of the route already surveyed, but would only be in the nature of an extension of that line.

These comprise the entire list of authorities cited by solicitor for complainant, which have any bearing whatever upon the real questions involved in this present cause.

It will be seen that these cases may be grouped into three classes:

1st. Where, by statute, the finding at the inquisition was made to vest some right and fix some liability, such as the making of it a judgment upon which execution might issue, and the like.

2d. Where, by statute, some act or set of acts was made a location in the sense contended for; and,

3d. Where the object for which the charter was granted had been fully and completely enjoyed, and a new object was sought to be gained; such as the change of the line of a railroad after actual construction and operation.

It can scarcely be necessary to add that no case falling within any of the classes or groups above, can have the slightest pertinency or bearing to the cause now before me, since there are no such statutes in Delaware.

Before considering in detail the cases cited by coun-

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sel for the defendant company, it will not be improper to recapitulate the points of contention raised.

The complainant insists that the action of the Odessa & Middletown railway in surveying one route, having commissioners appointed, and suffering those commissioners to meet and decide on the amount of damages for the disagreeing owners of land along such survey, amount to a location of its proposed road in the technical and restricted sense of the term; and that the effect of a location is to exclude any and all subsequent attempts at alteration or variation of the located route.

The defendant, on the contrary, contends that the real question is, not as to the effect of a location as employed by the complainant, but what constitutes or amounts to such a location; and claims that, except where they are based upon legislative statutes, which particularly specify what act or set of acts shall have such an effect, no cases or principles cited by complainant's counsel go further than that the actual laying down of the tracks, the construction and operation of a road, amount to such a location.

It must be borne in mind that the charter and its supplements of this defendant company did not, and does not anywhere set out or define the route of the proposed railway, except as to specify its termini. On the contrary, a wide election as to the particular route to be selected is particularly conferred in section 6 of the charter, which provides:

"That the said company shall have power to survey, locate and purchase such lands and rights of way within the limits of New Castle County, as said company may deem necessary for their purpose," etc. Page 561, vol. 14, Laws of Delaware.

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It may not be amiss to remark here, parenthetically, that the term "locate," as used here and in other portions of the charter, seems to have been employed so loosely and untechnically, as to convey the impression that it was used in this instrument more in the effort to employ the usual number of imagined synonyms in which legislative provisions abound, than with any intent as to a technical user.

Returning, however, to the general language of the provision quoted, it will be seen that this defendant company was given the broad power of selecting any route within the limits of New Castle County, so long as the termini were in the Towns of Odessa and Middletown. Now, the point raised by the complainant, that the acts referred to constitute a location in the most technical sense, entails the holding that those acts amounted to such an exercise of the power thus conferred as to totally and entirely exclude this power of election afterwards.

A few general principles of law may be laid down here whose truth can scarcely be gainsaid.

Except through *laches* or waiver (which are not contended as existing in this case), the power of election cannot be lost, except by such a selection of one of the subjects or rights embraced by the election as confers a positive right to the subject or right so selected, upon the party in whom the power of election once existed.

Applying this well-settled principle to the case in hand, I am led of necessity to conclude that those acts of the defendant company referred to, must be held to have at once given it an actual title to the land so first by it surveyed, or else the power of election has not been

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exhausted. Going but the next logical step further, I must also be of opinion that those same acts gave to the owners of the land covered by the first survey, an immediate legal claim to the value or damages for the land so surveyed, independent of any other act of the defendant, since there must be mutuality to confer rights, and the defendant could not acquire title to land without at the time rendering itself liable for its value or price.

If, then, the Odessa & Middletown railway did not, by the first survey, the appointment of commissioners and their decision as to the damages, immediately acquire a legal title to that land, or that the owners of the land did not at the same time acquire a legal right to recover judgment against said company for its assessed value or damages, the complainant's contention must necessarily fail.

Apart from any precedents upon the points I have just raised, the charter itself, of the defendant, seems well nigh sufficient in the language there employed, and its manifest intentment.

In section 6, above referred to, the following provision occurs:

"And the said freeholders" (commissioners to assess the damages), "or a majority of them, shall certify their finding and award to both parties, whereupon the said company, on paying the damages so assessed, or depositing the same in New Castle County National Bank, of Odessa, to the credit of said owner or owners, shall become entitled to have, use and enjoy said lands and rights of way for the purpose of said company forever." Chap. 513, § 6, vol. 14, p. 562, Del. Laws.

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It seems very clear that by this language, two conditions precedent are, and were intended to be, attached to the vesting of title to lands in the defendant — first, the certifying of the finding or award of the commissioners to both parties; and second, the payment or deposit of the damages assessed by the defendant. Nevertheless, the statement of facts agreed upon by both parties, expressly negatives the performance of either one of these conditions, as it is specifically stated that the commissioners did not certify their finding and award to either party, and that the damages never were paid or deposited by the defendant.

It is, perhaps, quite true that with respect to the latter condition, that it was designed purely for the protection of the landowner, and not in anywise for the benefit of the railway company, but it is, notwithstanding, a condition whose performance is expressly made necessary to the vesting of the title to the lands.

I will now proceed to review the most important and analogous cases cited by solicitors for respondent.

The Baltimore & Susquehanna R. R. Co. v. Nesbit & Goodwin, 10 How. 395.

This case came up to the Supreme Court of the United States on appeal from the District of Maryland. The facts were that the plaintiff company had been incorporated by the Legislature of Maryland, for the purpose of constructing a railroad from the City of Baltimore to some point or points on the Susquehanna river. To enable this company to acquire such lands, earth, timber, or other materials as might be necessary for the construction and repairing of the road, the law above mentioned, by its fifteenth section, authorized the com-

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pany to agree with the owners of land and other materials wanted for the purchase or use thereof, and in the event of a disagreement with the owners, or that the owners were legally disqualified to agree, this section provided that a justice of the peace of the county, upon application, should thereupon issue his warrant to the sheriff to summon a jury, who, in accordance with the directions contained in the same section of the statute, should value the damages which such owners would sustain, and that the inquisition, signed and sealed by the jury, should be returned by the sheriff to the clerk or prothonotary of his county, to be filed in court, and that the same should be confirmed by said court at its next session, if no sufficient cause to the contrary be shown.

This section further provides, that "such valuation, when paid or tendered to the owner or owners of said property, or to his, her, or their legal representatives, shall entitle the company to the estate and interest in the same, thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be recovered from the company without cost by the said owner or owners, his, her, or their legal representatives."

In accordance with the provisions of its charter, the plaintiff surveyed its proposed route, commissioners were duly appointed, the damages were assessed, the award signed, sealed and filed, and in due course of time the inquisition was confirmed and made a judgment of the court. In short, every act and condition set forth in the charter was performed to the letter, with the soli-

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tary exception that the damages assessed were not paid or tendered.

It will be seen that this case is practically on all fours with the case now under consideration, except that the case in Howard goes further in that the finding or award of the commissioners was even made a judgment of the court.

Subsequently, and while yet the damages were unpaid and untendered, the Legislature of Maryland passed an act vacating the inquisition, and that the County Court direct an inquisition *de novo*. The plaintiff company then proceeded to tender the amount of damages previously assessed, together with interest up to the date of such tender, to the disagreeing owners, the defendants, which tender was refused. The County Court then, on petition, issued a rule on the plaintiff to show cause why the inquisition should not be set aside as directed by the statute referred to, and upon the hearing, did set aside the said inquisition, and ordered a new one.

The main question raised by the plaintiff before the Supreme Court was as to the legality of this latter act of the Maryland Legislature; the plaintiff insisting that the granting of the charter, the survey of the route, and the appointment and inquisition of the commissioners, conferred such a right upon it to the land in question that the new statute was in effect an impairment of a contract, and hence unconstitutional.

The court decided that there was no impairment of the obligation of contracts, because not one and not all of the acts of the plaintiff company, of the meeting and assessment of damages by the commissioners, or of the confirming of the inquisition by the County Court, con-

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ferred any right or title upon the plaintiff, or any right upon the owners of the land, and that hence the statute in question was valid.

The court, on page 3, of the opinion, say:

“Thus it appears that it is the payment or tender of the value assessed by the inquisition which gives title to the company, and consequently, without such payment or tender, no title could, by the very terms of the law, have passed to them.”

And on the same page, say further:

“It can hardly be questioned, that, without acceptance by the act, and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty before such acceptance wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption. This being the case, there could up to this point have been no mutuality, and hence no contract, even in the constrained and compulsory character in which it was created and imposed upon the proprietor by the authority of the statute.”

It is difficult to imagine words more pertinent to this case than these of the Supreme Court. It is true that the question raised was not directly as to the power of the corporation to change its route, but the court manifestly perceived that the solution of such a question involved exactly the same principles as that really before them, and expressly allude to the right of the plaintiff company to have changed its route

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so first surveyed at any time prior to the payment or tender of the damages.

I shall next consider the case of *Graff v. The Mayor and City Council of Baltimore*, 10 Md. 544, with some degree of minuteness, more particularly because the solicitor for complainant, in his brief, relies upon the opinion of the court in that case as "questioning the authority, as it may properly do," of the ruling in 10 How., just considered.

The facts were as follows:

By the act of 1853, power is given the mayor and city council of Baltimore to "agree with the owner or owners of any land, real estate, spring, brook, water or watercourse, earth, timber, stone or other materials, which the said mayor and city council of Baltimore may conceive expedient or necessary to purchase and hold, for the purpose of introducing water into the said city," and provision is further made, in the event of a disagreement with such owners, for summoning a jury "to inquire into, assess and ascertain the sum or sums of money to be paid by the said mayor and city council of Baltimore, for the land," etc.; the inquisition of the said jury to be signed and sealed and filed with the clerk of the Circuit Court of the county, and be confirmed by said court at its next term, unless, etc. *"And such valuation, when paid or tendered to the owner or owners of said property, or his, her or their legal representatives, shall entitle the said mayor and city council of Baltimore, to the use, estate and interest in the same, thus valued, as fully as if it had been conveyed by the owner or owners of the same."*

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Under the act referred to, an ordinance was passed by the city adopting a plan for the introduction of water over, among other lands, the property of plaintiff. The plaintiff was at that time in the act of making improvements on the property in question, and was notified by the city to desist, as his land was to be taken for the purposes aforesaid.

Subsequently, the jury was summoned, the inquisition held, the damages assessed, and the finding returned to the proper court, which confirmed the inquisition *nisi*.

Still later, the city passed another ordinance repealing the former one, and directing its counselor to resist the confirmation of any and all inquisitions held under the provisions of the first ordinance. Nevertheless, the Circuit Court, to which the inquisition had been returned, after full argument, ordered it to be ratified and confirmed. The plaintiff then demanded the amount of the damages so assessed to him, and on refusal, applied for mandamus to compel the payment, alleging that he had suffered from the holding of the inquisition by the stoppage of his proposed improvements, counsel fees, etc.

Tuck, Justice, in delivering the opinion of the court, first states the questions involved, and then refers to the case of *The B. & S. R. R. Co. v. Nesbit*, in 10th Howard, as being identical in material facts and points raised with the case before them, and says that this case "is decisive of this appeal, if we are to recognize that decision as authority." The learned judge then proceeds to fully and completely uphold and indorse the ruling in 10th Howard, quoting copiously from that

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case with approval, and deciding the case before him upon its strength.

I will quote at large from the opinion, in order that the mistake of solicitor for complainant, in declaring that it questions the authority of the 10th Howard case, may be clearly shown.

On page 551, the court say:

“Upon the first, we agree with the appellee’s counsel, that the case of *The Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. 395, is decisive of the present appeal, if we are to recognize that decision as authority. The charter of that company, as far as concerns the present inquiry, is substantially the same with the act under which the claim of the appellant is now made. Why different constructions should be placed upon them, we do not perceive. If the title to the land condemned under the first of these laws did not vest in the company, because the valuation had not been paid or tendered, it follows, that such payment or tender was necessary to give title to the City of Baltimore in the property of the appellant. The court” (in 10th Howard), “say: ‘it can hardly be questioned that, without acceptance by the acts and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption. This being the case, there could, up to this point, be no mutuality, and hence no contract, even in the constrained and compulsory character in

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which it was created and imposed upon the proprietors by the authority of the statute.' And, in another part of the opinion, these terms are called 'conditions indispensable to the vesting of a title in the company.' Now, if the title does not vest in the city until payment or tender, and the owner could compel payment by legal process, there would be no mutuality. The city might be required to pay for land that it may never use or need for the purposes of the act. This certainly would be a hardship upon the citizens of Baltimore, from which we think they should be relieved *by adopting the interpretation of the Supreme Court in the case cited.*"

It seems only necessary for me to say that, in the face of such a plain and express indorsement of the ruling in the 10th Howard case, by the court in 10th Maryland, I cannot imagine that it will longer be seriously contended that the latter questions the former, but, on the contrary, that it entirely sustains and upholds it in every particular.

The case in 10th Maryland may, however, be further cited against yet another point made by solicitor for complainant, namely, that a decision in favor of the right of a railway corporation to abandon, after inquisition, one proposed route for another, would be of great injury to the owners of land along the first route, since the survey and inquisition would have the effect of putting a stop, at least temporarily, to proposed improvements on the land, beside putting such owners to the inconvenience and expense of proving their damages at the inquisition afterwards abandoned.

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I do not think this point can be better or more fully answered than by a quotation from the case in 10th Maryland, on which the solicitor has relied as a refutation of the ruling in 10th Howard.

On page 552 of the opinion, the court say:

“ This may be a severe system of legislation, as was said, because it places the property-owner at the discretion, not to say caprice, of the other party, by allowing it to condemn and afterwards abandon the property. But this construction is not likely to work so much injustice as that contended for by the appellant, because, by the latter, the city is deprived of all choice of another location, after a condemnation is once made and affirmed, no matter how great the necessity might be afterwards for adopting another, even if the owner of the land condemned had not sustained any damage by the act of the city in making the condemnation. These inquisitions too often tax the corporation beyond the value of the lands, or the damages sustained, and the only relief it has against such wrongs is to decline taking the land; of this, the owner cannot complain. In cases, however, where the owner has suffered loss by the acts or delay of the corporation, redress might be had in another way. And this is an advantage which he has over the other party.” And the court concludes that the owners of land so condemned and then abandoned by the corporation, do in fact have a remedy for any loss they may sustain by such condemnation and abandonment.

Here, then, is a complete answer to the main objection raised by complainant — that the power to choose another route oppresses the property-owners along the

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first route; besides, being a sufficient guarantee that corporations will not capriciously, or for the purpose of "chaffering with landowners," resort to inquisitions, since the condemnation alone, whether accepted or abandoned, confers upon the owner a full redress for any and all loss sustained, and a consequent liability upon the corporation for such redress.

Further, in regard to the authority of the case in 10th Howard, the following cases, hereafter considered in detail, cite that case with approval and indorse its ruling to the fullest extent. *Graff v. M. & C. C. of Balt.*, 10 Md. 544; *Norris et al. v. M. & C. C. of Balt.*, 44 id. 298; *Stacey v. Vermont Cent. R. R. Co.*, 27 Vt. 39; *Burl. & Mo. R. R. Co. v. Sater*, 1 Clark, 421; *State ex rel. Hayes v. Cin. & Ind. R. R. Co.*, 17 Ohio St. 103; *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Iowa, 523.

Norris et al. v. The Mayor, etc., of Baltimore, 44 Md. 598.

The facts were as follows:

Under an ordinance of the defendant, a jury was summoned, inquisition held, damages assessed for the taking of plaintiff's land, the award returned and made a judgment of the proper court. For several months, defendant neither paid nor tendered the assessed damages, nor abandoned the inquisition or the proposed location. The language of the act under which the inquisition was held, was similar to that in the 10th Howard and the 10th Maryland cases, just before considered, as to the payment or tender of the damages before title to the land passed. Finally, the defendant did pay the damages, but plaintiff demanded interest on this amount from date of condemnation to time of payment of principal

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sum, which was refused. The recovery of this interest was the object of the controversy.

It will be seen from this statement that no question, either of the actual abandonment of the inquisition, or of the right of the defendant to have chosen another site, was directly involved in this case, but the opinion of the court is, nevertheless, of strict relevancy to this issue, because it contains rulings upon the main points insisted upon by complainant; and so necessary to the solution of the actual point involved were the rulings upon these points, that they cannot, with any show of reason or comprehension of the principles adjudicated, be classed as *obiter dicta*.

On page 604 of the opinion, the court say:

“It has long been the settled law of Maryland, that both *private* and municipal corporations, when authorized to execute the power of eminent domain, have the right to renounce the inquisition and select a more eligible route, or to wholly abandon the improvement or enterprise, at any time before actual payment of the amount assessed, either by commissioners or jury, and until that time, no title to the property condemned vests in the corporation. *Balt. & Susq. R. R. Co. v. Nesbitt*, 10 How. 395; *Graff v. Mayor & C. C. of Balt.*, 10 Md. 544; *State ex rel. McClellan v. Graves*, 19 id. 351; and *Merrick, Admr. of Warfield, v. Mayor & C. C. of Balt.*, 43 id. 219.”

In this quotation, the court cites the case in 10th Howard and that in 10th Maryland, in, as it were, the same breath, and to uphold the same principle.

Evidently the court did not concur in the opinion of solicitor for complainant, that the latter of these two

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cases "questioned the authority" of the former. This undoubtedly settled any question as to the weight of the 10th Howard case in Maryland.

The quotation is of a far broader and longer reach, however, than as to this one point.

The complainant's solicitor insists that those cases in which public or municipal corporations are one of the parties, must not be taken as decisive of controversies between private corporations and individuals. From the language quoted from the opinion, it is manifest that, in Maryland, at least (whose statutes seem substantially similar to those usually passed in Delaware), the ruling of the courts upon the effect of inquisitions and condemnations under power of eminent domain, applies indifferently to both classes of these artificial bodies.

On the same page, the court say further:

"We may remark, however, that we have seen no case, and think none can be found, which has gone to the extent of deciding that the mere assessment of damages by commissioners or a jury constitutes such taking. Such assessment is simply a mode prescribed by law, for ascertaining the value of the property to be taken, or the damages that will be sustained by the taking. It is a step preliminary to the taking, and not the taking itself."

And on page 607, it is laid down that:

"But when the assessments have all been finally settled, the city can then fairly exercise its election to abandon the enterprise, or pay the assessments and proceed with the work."

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By these words, it will be seen that the "election" vested in the party in whom the power of eminent domain resides, is not lost or waived until payment or tender, simply because until that time no interest has devolved upon the holder of such a power, and, therefore, there is no just cause for the loss of the election.

When it is borne in mind that practically the same language as to when title to the land sought passes (on payment, tender, or deposit), was employed in the statutes under which the corporations, which were parties in the cases in Maryland just reviewed, acted, is used in the charter of the Odessa & Middletown Railway, this respondent, the rulings in the Maryland cases would appear to apply to the cause before me with peculiar force.

Solicitor for complainant insists that all authorities, which do not involve the question of the power of a railway corporation to change a route which has been surveyed and for the condemnation of the lands along which an inquisition has been held, and which simply go to the extent of holding that such survey and inquisition alone do not vest title to the land in the corporation, or do not give a legal right to the landowners to recover the damages assessed, are not relevant or pertinent to the case now before me.

Now, the material point made by complainant is, that a location precludes a change of route, unless such change is expressly authorized in the charter; and that a survey and condemnation of the lands constitute a location in this sense and to this effect.

I think that those cases which hold that no title vests in the corporation on the one hand, and no right to the

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assessed damages accrues to the landowner on the other by the survey and condemnation proceedings simply, may and do have a peculiar force and weight in the decision of this case.

It must certainly be admitted that there can be no location, in any sense or meaning of the term, without a legal right to locate; without such a right, whatever the acts or things done, they can in no event amount to more than a trespass. Suppose the charter should fix the route of the proposed railway by courses and distances, metes and bounds, but the corporation should nevertheless cause another and different route to be surveyed and condemnation proceedings to be had on such different route, could this be held to be a location of their road? Could it be anything other than a trespass?

A location is not a mere right, it is an act; it is not the power to do a thing, it is the thing itself. This is necessarily involved in the contention of solicitor for complainant.

If, then, the location of a railroad is the actual settling of the road on the land indicated, there must exist the legal right to so settle that road on those particular lands where the location is claimed, or it is a trespass and not a location. But if no title vests in the corporation by the survey and condemnation merely, or (which is correlative) no legal right to the assessed damages accrues to the landowners by such proceedings alone, there can be no legal right in the corporation to locate its line. If such a right did exist under such circumstances, then that provision in the charter in the present case requiring payment or deposit of the damages before title passes is absolutely void and of no effect, and this

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defendant company might have treated it as such and gone on the land at its will, leaving the owners with merely the right to sue them for those damages. Our legislatures have, however, considered that it would be an injustice and oppression to give to the owners of property in such cases, a mere right or chose in action; and it was for their benefit alone that the payment and deposit was made a condition precedent.

Here, then, the contention of complainant is reduced to this, that the line of a railroad may be located in the strictest sense of the term, and yet there be in the company absolutely no right to further go upon that land, or to make one step towards its construction. This would, indeed, present an anomalous state of things paradoxical in the extreme.

Let me state this point in yet another form. A location, in the sense contended for by solicitor for complainant, constitutes an unalterable, unchangeable fixation or establishment of the proposed road, as fully and completely in its effect as if the actual roadbed were constructed and the rails actually put in place. By a general statute or a particular provision in a particular charter, such an effect could, of course, be produced at any time or by any action of the company or other party, however insignificant in itself; but in a case where no such general statute prevails, and in a charter where no such provision is to be found, it would be palpably unreasonable to hold that such a violent and far-reaching effect could be produced except as the natural consequence or result of some act or step which of itself fixes and establishes some right or power sufficiently important to warrant such a result.

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Now, complainant insists that the condemnation proceedings is the step which produces the effect contended for. It is proper, therefore, to inquire why and how it does. It is not pretended that the survey alone would cause such a result, and yet why should it not? Certainly, there can be no reason for such a difference in effect unless it is shown that the condemnation proceedings have, either of themselves or by force of some statute or legislative provision, the effect of fixing or vesting some right or interest which the survey does not. Then, surely, all cases which throw any light on the effect of a condemnation of land are of peculiar relevancy to the matter in hand, and should be important aids to its just and proper solution.

In order that this shall be absolutely true, however, only those cases where no general statute affects the operation of the inquisition and where the language of the particular charter is substantially similar to this defendant company so far as it relates to that act, may be taken into consideration.

With this well in mind, it will be found, I think, that the following cases are illustrative of the force and effect of the condemnation proceedings.

In *Stacey v. Vermont Central R. R. Co.*, 27 Vt. 39, the charter required the payment or deposit of the assessed damages before title to the land should pass to the company. I will quote from the opinion:

"They" (the company) "derive no title to the land or any easement growing out of it from the fact of their having surveyed the road across the plaintiff's land, or having placed that survey on record, nor by having the damages appraised by commissioners, and causing their

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award to be recorded. This statute is express, that the payment or deposit of the money according to the award must be made before any such right accrues. Until that payment is made, the company have no right to enter upon the lands to construct the road or exercise any act of ownership over the same. A court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. The survey and appraisal of damages are merely preliminary steps to ascertain the terms upon which the land can be taken for such purposes, if the company shall see fit to use the same for the construction of their road. If it is accepted, and the company conclude to take the land, that acceptance and that taking is consummated only by a payment or deposit of the money, for the use of the owner of the land, as directed and awarded by the commissioners."

And on page 46, the court say further:

"When the corporation obtains a vested right to the land, or to the easement, the landholder has a vested right to the damages; that specific act which vests the right in them gives also a vested right to the owner of the land. These respective rights are correlative and have a reciprocal relation; the existence of one depends upon the existence of the other. If the corporation have no vested right to the land, the owner of the land has no vested right to the price which was to be paid for it." *State ex rel. Hayes v. Cincinnati & Indiana R. R. Co.*, 17 Ohio St. 103.

. In the charter of the railway company and under the Constitution, payment or deposit of the assessed dam-

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ages was made necessary to the vesting of title to the land condemned.

The defendant company proceeded to have its proposed route surveyed, and instituted condemnation proceedings under the law. The inquisition was held and the damages assessed. The company then entered on the record of the court out of which the inquisition proceeded a note of their abandonment of that particular route, and afterwards did *actually* construct their road over another and *different* route and over different lands.

The direct question raised was whether the proprietors of land along the first route could recover the assessed damages. So far as I can ascertain, however, no express power of abandonment or of a change of route is anywhere given to the defendant company in its charter or any general statute; and if such power did exist it must have been drawn inferentially from language similar to that employed in the charter of the Odessa & Middletown railway.

The following points were ruled by the court:

"That no appropriation of the lands of the relators could be completed, no title from them could be acquired, and no incumbrance could be imposed upon their estate by the railroad company until the amount of compensation fixed by the finding of the jury was paid in money, or secured to be paid by a deposit of money."

"That the finding of the jury not being complied with, the relators are in *statu quo*, as if no proceedings in the Probate Court" (the condemnation proceedings) "had ever been commenced. They have lost nothing and are not entitled to complain of anything. The rail-

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road company having abandoned all claim to a right of way over the land of relators, it could not thereafter acquire such right of way except by the commencement of proceedings" (condemnation proceedings) "*de novo*, and, perhaps, not even by such means."

"If there were no express abandonment of the claim to appropriate a right of way entered of record in the proceedings of the Probate Court, the fact that the corporation had constructed its road upon another line, not touching the lands of the relators, is conclusive evidence of such abandonment, and leads to like results."

"And we are furthermore unanimously of the opinion that if there were no express abandonment of claim in either of these ways, it would be the right of a landowner, immediately after verdict and its condemnation, by a demand from the corporation of the amount assessed in his favor, to compel it to elect whether it would complete its appropriation by the payment of the money, or on failure to do so promptly, within a reasonable time, submit to be held to have abandoned its claim and to have subjected itself to whatever consequences are involved in such abandonment. It would be intolerable that the landowner should be hung up in uncertainty in respect to his rights by the nonaction of the corporation."

In *Cape Girardeau & Scott County Macadamized Road Co. v. Dennis*, 67 Mo. 438, the court held that the plaintiff had the right to alter its proposed route after condemnation proceedings, but before actual construction over the land so abandoned, though this power of alteration or of abandonment was not expressly given by the special act or the general statutes. In

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this case, also, the question as to the power of the alteration was particularly raised.

In *Schreiber et al. v. Chicago & Evanston R. R. Co.*, 115 Ill. 340, the court, on page 344, say:

“Our statute provides that ‘the judge or court shall, upon such report,’—*i. e.*, report of the jury assessing damages—‘proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same, upon payment of full compensation, as ascertained as aforesaid; and such order, with evidence of such payment shall constitute a complete justification of the taking of such property.’ R. S. 1874, p. 477, § 10. And so we have held that, until the compensation is paid, there is no right to enter upon the premises—that until that time, the company seeking condemnation has the right to abandon the location and adopt another.”

It will be noted that the court here use the term “location” in a sense diametrically opposed to that contended for by solicitor for complainant. The court rule that a change of route may be had by the company after such acts or proceedings as constitute what they see fit to denominate a “location.”

It will be remembered, however, that even in the opinions of courts, terms which have both a technical and restricted meaning and also a popular and broader signification may and often are used in either sense.

The court, continuing, held that no rights vested until compensation actually paid, neither in favor of the proprietor nor of the company, and that until then, in effect, the case stood as though no steps had ever been taken by either in the matter of the proposed railway.

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In *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Iowa, 523, condemnation proceedings were had at the instance of the railroad company; under the provisions of the general statutes of Iowa, freeholders were summoned by the sheriff as commissioners, who duly made their award assessing the damages, which were returned to the proper court, an appeal was taken by plaintiff, a property-owner, but the first award was confirmed by the court. It must be noted that nowhere does there appear in the law under which the defendant company secured its powers as a corporation, and under which the condemnation proceedings were had, that any power of abandonment of the inquisition or right to alter or change their route was given. There was, however, a provision requiring the payment of the damages before the actual taking of the land.

This state of facts puts this case on all fours with that now before me. I will quote from the opinion:

“But let it” (the selection of a proposed route by a railroad) “depend upon whatever it may, the right of the company to fix the route primarily, and to change it in advance of (and perhaps after) actual construction, in accordance with their own discretion, is a right which cannot now be questioned.

“If the company shall take steps for the condemnation of a right of way, and find the assessment beyond their ability or interest to pay, it may change its route to such locality as may be within their ability to pay or interest to adopt. But, of course, in case of any change of route, after proceedings for condemnation are concluded, the company would be liable not only for the costs but also for any expense in removing fences or

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buildings, or forbearance to cultivate the land, if the same were incurred or done at the instance of the company, and upon the faith of its acceptance of the route and assessment. It is true that this construction of the law places it in the power of the railroad company to make changes in their routes and to cause repeated assessments to be made on different routes of the value of their right of way. But the only restraint upon such a course within the power of the courts is the visitation of the costs and the incidental liability mentioned above. If the right to make such changes and take such repeated proceedings is an evil, it is alone within the power of the Legislature to prohibit it."

Burlington & Missouri River R. R. Co. v. Sater, 1 Clark, 421.

This was a case in which the railroad company desired to condemn lands for a right of way over the lands of defendant. A jury was drawn and damages assessed, an appeal was taken by defendant, after which he petitioned for a change of venue. Then the company wished to abandon the proceedings and the right of way.

The court say, on page 422: "In this case, it appears that the company, in the construction of their road, desired the right of way over the defendant's land. To assess the damages, a jury was called. With their award the defendant was dissatisfied, and appealed to the District Court. Up to this time the company had acquired no right to the land, nor any easement therein, and could not until the payment of the money. * * * The company, therefore, had a perfect right to abandon the proposed route, and upon the payment of full costs, for this or any other reason dismiss the proceedings."

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The case goes on and cites the 10 Howard case.

And now, to-wit, this 15th day of November, A. D. 1895, the motion to dissolve the preliminary injunction issued in this case having been heard before the Chancellor on the 12th day of October, A. D. 1894, upon bill and answer and a statement of facts duly agreed to by solicitors of the respective parties, and having been debated by them and the same having been held under advisement until this day, it is now ordered, adjudged, and decreed by the Chancellor that the preliminary injunction be and the same is hereby dissolved.

Syllabus.

THE EQUITABLE GUARANTEE AND TRUST Co., Trustee,
Appointed by the Chancellor under the Last Will
and Testament of THEODORE ROGERS, Deceased, v.
MARY N. ROGERS, ANNIE R. DU PONT, THEODORE B.
ROGERS, and HELEN R. BRADFORD.

New Castle, September Term, 1895.

Rights of life tenants and remaindermen in trust estates, to accumulations and income of the estate up to and after the period fixed for division of the estate; Construction of wills; General intent and particular intent appearing in the will; Definition of the word "accumulations" as used in a will.

1. Whenever upon the face of a will, two intents are manifest, the one general and for a general period, and the other particular, for a particular period and a particular portion of the estate, the two are not held as conflicting, but the latter is to be taken as an exception to the former.
2. A testator devised all his estate to trustees in trust to hold all the rest and residue of his estate (after reserving as much of the securities as they might deem necessary to raise a certain annuity for his widow) in trust to apply so much of the income thereof as they might deem proper to the support and education of his children during their minority, and in trust when his first child should attain the age of twenty-one years, to divide his residuary estate into so many shares as there were children at the time of the division; and as the children arrive respectively at their majorities, to pay over to them respectively the income of their respective shares of his estate for the term of their natural lives, etc. In section 7 of the will, the following occurs: "I hereby declare that my said executors" (trustees)

Syllabus — Statement — Argument for complainants.

tees) " shall stand possessed of the accumulations of my residuary estate and the income thereof, upon and for the same trusts and subject to the same declarations hereinbefore made concerning the estate from which such accumulations shall have proceeded."

- a. Held, that the accumulations, enhancements and increase in certain stocks forming a part of the estate from the death of the testator up to the majority of the eldest child, the period fixed by the will for the division, were to be treated as a part of the *corpus* or capital of the estate and subject to the declaration of trust, and not as income to be paid to the children absolutely.
- b. But held also, That such accumulations, enhancements and increase on the share of the youngest child from the majority of the eldest to her own majority, would go absolutely to her as income.
- c. Held also, That all excess in the amount reserved by the trustees for the raising of the widow's annuity over and above what was necessary, was a part of the *corpus* or capital of the estate, and not income.
- d. Held also, That the word "accumulations" as used in section 7 would cover the yearly earnings and profits of a corporation in which the testator held stock, in whatever form they might exist, which had not been distributed in dividends among the owners of the stock at the time it went into liquidation.

BILL FOR INSTRUCTIONS.— The facts in this case are stated in the first part of the opinion of the Chancellor.

W. C. Spruance and C. M. Curtis, for complainants.

The questions raised in this cause are:

First. Are the daughters of the testator entitled to have paid to them the income from the trust estate re-

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ceived by the trustee in excess of the annuity to Mrs. Rogers, or is such excess to be held as part of the principal of their trust estate?

Second. Are the various sums of money and securities received by the trustee upon the shares of stock of the Rogers Locomotive & Machine Works to be held by the trustee as part of the principal or part of the income of the trust fund?

The contention of the trustee upon the second question is, that all the moneys and securities received upon the shares of stock of the Rogers Locomotive & Machine Works since February 15, 1893, and to be received hereafter, are to be treated as part of the principal or capital sum of the trust fund, and not as income, and for the following reasons:

(a) Because they were all apportionments made to shareholders as divisions of assets of a corporation which had ceased to do business, had sold all its plant and property, and was in the process of liquidation preparatory to final dissolution.

(b) Because the amount so distributed consisted partly of accumulated earnings and undivided profits which had been capitalized by the company, and must, therefore, continue to be capital or principal.

(c) Because nearly one-half of the amount so distributed consisted of a consideration received upon the sale of the plant, and all real and personal property, contracts and good-will of the company, which was clearly capital or principal.

(d) Because the resolution of the stockholders and the several resolutions of the directors of the company showed that in substance and intent it was not a division

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of earnings, profits, or income as such, but an apportionment and distribution of all its property as capital.

(e) Because a distribution made and to be made upon the stock is in exchange and substitution for the shares, and, therefore, is to be treated as principal, the shares being part of the principal of the trust estate.

(f) Because the evident intention of the testator was to make all such distribution part of the principal of his estate.

A division of the assets of a corporation which has ceased to do business and sold its plant and all its property, and is in process of liquidation, preparatory to a final dissolution, is a distribution of capital, and the distribution received by a trustee holding shares of stock become part of principal and not the income of the trust estate. 1 Morawetz on Private Corporations, §§ 443, 467; Gifford v. Thompson, 115 Mass. 478; Richardson v. Richardson, 75 Me. 570.

If a corporation has used the whole or a part of its earnings or profits to extend its business, increase and renew its plant and business operations, or to purchase securities, land, or other property, it has thereby capitalized or fused into capital such earnings or profits, and they will continue to be capital when the corporation goes into liquidation preparatory to dissolution and distributes such accumulations. Gibbons v. Mahan, 136 U. S. 549; Irvine v. Houston, 4 Pat. Sc. App. 521; In re Barton's Trust, L. R. 5 Eq. 238, 243, 245; Bouche v. Sproule, L. R. 12 App. Cas. 385; Spooner v. Philips, 62 Conn. 62; In re Smith's Estate, 140 Penn. St. 344; Vinton's Appeal, 99 id. 434; Davis v. Jackson, 25 N. E.

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Rep. (Mass.) 21; In re Brown, 14 R. I. 371; Minot v. Paine, 99 Mass. 101.

If a corporation makes sale of all its real and personal property, including its plant, contracts, good-will, and business, and distributes the proceeds among its stockholders, such distributions are held to be capital. Wheeler v. Perry, 18 N. H. 304; Heard v. Eldridge, 109 Mass. 258; Clarkson v. Clarkson, 18 Barb. 648; Vinton's Appeal, 99 Penn. St. 434; Wheeler v. Perry, 18 N. H. 307.

The method and terms by which the officers of a corporation exercise their discretionary powers with respect to the distribution or retention of the profits or earnings of a corporation determine the destination of such distribution, whether to the life tenant or remainderman. In a word, what the company says is income is income, and what it says is capital is capital. Sproule v. Bouche, L. R. 12 App. Cas. 385; In re Ker-nochan, 104 N. Y. 628.

If a corporation in the process of liquidation with a view to final dissolution distributes assets among its stockholders, and the amount so divided is so indorsed on the certificates of stock of the shareholders, such payments will be deemed to be made of capital or principal and not income as between the life tenant and remainderman.

The intention of the testator must control the distribution of the funds in question as principal.

George Gray and H. H. Ward, for respondents.

The main questions raised by the bill of complaint and the answer are:

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First. Whether or not Mrs. Du Pont and Mrs. Bradford are entitled to have now paid over to them their respective one-third shares of all excess of income above the \$5,000 annuity, and proper expenses of that part of the trust which in the past has come into the hands of the several trustees under the will, arising from the securities and funds set apart and held by the said trustees to raise and secure said annuity prior to the order of this court of the 2d day of December, 1893.

And as a question subsidiary to the foregoing, whether this court will not direct an inquiry by some proper method to ascertain the total amount of such excess of such income heretofore withheld from these defendants.

Second. Whether any or all of the special dividends or bonuses declared by the Rogers Locomotive & Machine Works out of its treasury assets, as enumerated in the fifth paragraph of the amended answer of these defendants, are income or capital of the trust in Theodore Rogers' will; and, therefore, whether these defendants should have their respective one-third shares of such dividends now in hand paid to them, or whether such dividends should be capitalized and only the income thereof paid to these defendants for life.

During the minority of the first child of the testator, the children were entitled to equal shares of the income of the residuary estate, although the executors are given a discretion as to how much of said income shall be applied to the support and education of the children during their minority. This equality of interest is clearly indicated by the manifest intent throughout the will that his children should have equal shares in his

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estate. The rule of law is also clear. *Jones v. Foote*, 137 Mass. 543.

After the majority of the testator's first child, the capital itself of the residuary estate is directed to be divided equally into as many shares as the testator has children and the income of such shares from that time goes to the several children.

In this will there is a bequest of the income of shares in the residue to these daughters for life, with remainder over of the capital; they are, therefore, entitled as such lifetenants to such income from the death of the testator. *Williams on Exrs.* 1390, 1392, and note L; *Williamson v. Williamson*, 6 Paige, 298, 304; *Augerstein v. Martin*, 1 Turn. & R. 232; *Hewitt v. Morris*, id. 242; *Douglas v. Congreve*, 1 Keen. 410, 428; *Hilyard's Estate*, 5 W. & S. 32; *Lamb v. Lamb*, 11 Pick. 371, 378; *Minot v. Amory*, 2 Cush. 377, 387-389; *Lovering v. Minot*, 9 id. 151, 156; *Lawrence v. Security Co.*, 56 Conn. 423.

There appears in this will no direction to capitalize the income, received by the executors during the minority of the testator's children, in excess of what they might "deem proper" to apply to the support and education of such children. Neither does there appear to be a disposition of such excess of income to or for the use of any other person than such children. It will be presumed in the absence of a contrary intent on the face of the will, that the children of the testator, as life tenants, were the primary objects of his care, rather than the remaindermen of the fund. The right, therefore, of these defendants to the whole income of their shares during their respective life estates joined with the factors

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just noted, entitled them to have had paid them, upon their respective majorities, the entire excess of income of their shares above the expenditures made by the executors for their support and education. Penrose's Appeal, 102 Penn. St. 448; Farley v. Bucklin, 17 Atl. Rep. (R. I.) 132; Williams v. Bradley, 3 Allen, 270-285; Riggs v. Cragg, 26 Hun, 89.

It appears by the terms of the will that the testator intended to give the trustees an absolute discretion as to the conversion of his estate; in such a case, the court will not order sale, except in cases where the condition of the estate demands it, and the tenant for life may have the actual income of the unconverted assets. Lewin on Trusts, 290, 298, 304, 613; Re Sewell's Trusts, 11 L. R. Eq. Cas. 80; Eldredge v. Head, 106 Mass. 582; Miller v. Miller, 13 L. R. Eq. Cas. 263; In re Norrington, 13 L. R. Ch. Div. 654, 664, 665; Wrey v. Smith, 14 Sim. 202; Massey et al. v. Stout et al., 4 Del. Ch. 287.

Section 7 of the will provides that the executors shall stand possessed of the accumulations and income of the residuary estate for the same trusts as the *corpus*.

But, accumulation means the adding of income or interest to capital. Douglas v. Congreve, 1 Keen. 428.

Nowhere else in the will is mention made of accumulations, but even if this section is laid particular stress upon, it must be noted that such at most implied direction to accumulate, fixes no period during which such accumulation shall continue, and that the period for such accumulation will, under these circumstances, be limited by the court to one year after the testator's decease. Sitwell v. Bernard, 6 Ves. 520, 522, 527, 540-

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543; Entwistle v. Markland, id. 527, 540, 541; Vigor v. Harwood, 12 Sim. 172, 173, 177; Tucker v. Boswell, 5 Beav. 607; Stair v. Macgill, 1 Bligh (N. S.), 662, 683; Parry v. Warrington, 6 Madd. 156.

Where trustees under a will hold, as a part of the estate of a testator, stock in an incorporated company, in trust to pay the income thereof to certain persons for life, with a remainder over of the stock absolutely, or otherwise, after the decease of the life tenant, the persons so entitled to the income of said stock for life are, as between them and the remainderman of the stock, entitled to have and receive all dividends of said company, declared during their lifetime out of the earnings and profits of such company, and all dividends of every description whatsoever, declared during their lifetime, which do not impair the fund or capital which originally came into the hands of such trustees to hold for the purposes aforesaid. Under such conditions, it is wholly immaterial that such dividends represent earnings of such company collected in its treasury through an indefinite period; or that they had been withheld from the stockholders of the company prior to such dividends for a reserve fund, or for general purposes of the company, in accordance with any policy of the company, or that they are extraordinary in amount. It is also wholly immaterial whether such dividends are made in cash, or in the stock, bonds or certificates of indebtedness of other companies held by the dividend-declaring company, or even in the stock, bonds or certificates of indebtedness of the dividend-declaring company itself; the sole questions involved being whether the dividends are declared out of the earnings or profits of the com-

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pany, and whether the original capital fund, primarily coming into the hands of the trustees to hold as aforesaid, was thereby impaired. *Barkley v. Wainwright*, 14 Ves. Jr. 66; *Price v. Andersen*, 38 Eng. Ch. Rep. (15 Sim.) 473; *Preston v. Melville*, 39 id. (16 Sim.) 163; *Johnson v. Johnson*, 5 Eng. L. & E. Rep. 164; *Maclaren v. Johnson*, 3 DeG., F. & J. 202; *In re Hopkins Trust*, 18 L. R. Eq. Cas. 696; *Lord v. Brooks*, 52 N. H. 72; *Earp's Appeal*, 28 Penn. St. 368; *Wiltbank's Appeal*, 64 id. 256; *Moss' Appeal*, 83 id. 264; *Reed v. Head*, 6 Allen (88 Mass.), 174; *Leland v. Hayden*, 102 Mass. 542; *Harvard College v. Amory*, 26 id. 446; *Baleh v. Hallett*, 76 id. 402; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Ashurst v. Field's Admr.*, 26 id. 1; *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 id. 637; *In re Kernochan*, 104 N. Y. 618; *Woodruff's Case*, 1 Tuck. 58; *Millen v. Guerrard*, 67 Ga. 284; *Richardson v. Richardson*, 75 Me. 570.

The testator died in 1871, possessed of the stock in question, and it has been continuously held by trustees under his will for the last twenty-three years. There is no claim in the bill of complaint of this trustee, now complainant, that a single penny of the surplus earnings of this company heretofore distributed, or hereafter to be distributed, by way of dividends, was earned by the company or carried to an account of accumulated profits or surplus earnings, before or at the time of testator's death. No basis for any inquiry into the question of how much, if any, of these surplus earnings were collected in the treasury of the company prior to the testator's death, appears upon the pleadings. The court will not direct an inquiry which, owing to the lapse of

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time, would probably be fruitless, and especially when no basis for such an inquiry appears upon the pleadings. No case can be cited in which the court directed such an inquiry after anything like such a lapse of time; while, on the other hand, there are many cases in which the time, and hence the difficulty, was much less where the courts have not directed such inquiry. *Price v. Andersen*, 36 Eng. Ch. Rep. (15 Sim.) 473; *Barkley v. Wainewright*, 14 Ves. Jr. 66; *In re Hopkins' Trust*, 18 L. R. Eq. Cas. 696; *Maclaren v. Stainton*, 3 DeG., F. & J. 202; *Balch v. Hallett*, 76 Mass. 446; *Ashurst v. Field's Admr.*, 26 N. J. Eq. 1; *In re Kernochan*, 104 N. Y. 618; *Woodruff's Case*, 1 Tuck. 58; *Millen v. Guerrard*, 67 Ga. 284; *Richardson v. Richardson*, 75 Me. 570.

A corporation is the owner of all the property in its possession, including surplus undistributed profits, and may do with such property as it chooses. Until a dividend is declared, the stockholder, as such, has no title to the money covered by such dividend. The action of the corporation alone determines its character as a dividend, since it alone has the right to order its division as profits. Consistently with this principle, a court may rest upon the determination of the character of the dividend, made by the corporation, and refuse to direct an inquiry into the sources of the dividend, or when it was actually earned. *Price v. Andersen*, 38 Eng. Ch. Rep. (15 Sim.) 473; *In re Hopkins' Trust*, 18 L. R. Eq. Cas. 696; *Maclaren v. Stainton*, 3 DeG., F. & J. 202; *Lord v. Brooks*, 52 N. H. 72; *Harvard College v. Amory*, 26 Mass. 446; *Balch v. Hallett*, 76 id. 402; *In re Kernochan*, 104 N. Y. 618; *Millen v. Guer-*

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rard, 67 Ga. 284; Richardson v. Richardson, 75 Me. 570.

It appears from the testimony that the Rogers Locomotive & Machine Works began business in 1856, with capital stock of \$300,000, which was not increased, and, after paying regular semi-annual dividends, accumulated from time to time property which it invested in rebuilding, improving the plant and fixtures, in carrying on the business, in railroad securities, land, bills receivable, etc. These moneys, investments and securities were used in the conduct of its business.

The president and directors of the company say that these accumulations were never changed into capital, and say that all the assets in excess of the capital stock had always been treated as accumulated profits. But they say that it is impossible to state what was the amount of such accumulation in 1871, or in 1893, or at the present time; that the divisions of assets among its stockholders since February 15, 1893, were made in course of liquidation preparatory to final dissolution, and that the division of 100 per cent. in cash made pursuant to the resolution of March 16, 1893, was exclusively from capital, and all others were from profits.

As to the value of the stock in 1872, Jacob S. Rogers says it is impossible to state what it was, as it had not then, and never has had any market value, and it was equally impossible to make a valuation at or about February 15, 1893, or at the present time. But it is clearly stated that each of the divisions of assets had diminished the value of the shares, and that when the division of all the assets shall be completed, the stock will be valueless.

Argument for defendants.

It appears that all the payments and divisions made to and among the stockholders since February 15, 1893, were noted by the company on the backs of the certificates of stock for 250 shares, held by the trustee, as shown by the following indorsement:

“The holder of this certificate has received in the winding up and dissolution of the herein named corporation, the following assets:

1893.

May 23.	1,000 per cent. in stock of Rogers Locomotive Company	\$250,000
May 23.	100 per cent. in cash, being the amount of principal or par of the stock	25,000
May 23.	75 per cent. in N. Chatt. & St. L. 187½ shares.	
May 23.	60 per cent. in Louisville & Nash. 150 shares.	
May 23.	40 per cent. in Ills. Cent. Leased lines, 100 shares.	
May 23.	100 per cent. in cash	25,000
May 23.	100 per cent. in cash	25,000
May 23.	100 per cent. in cash	25,000
June 19.	100 per cent. in cash	25,000
July 12.	100 per cent. in cash	25,000
July 26.	100 per cent. in cash	25,000
Aug. 8.	100 per cent. in cash	25,000

Argument for defendants.

1894.

Sept. 26.	100 per cent. cash on		
	167 shares	\$16,700	
(a) Sept. 26.	100 per cent. cash		
	on 83 shares.....	8,300	
		<hr/>	\$25,000
Sept. 26.	144 1-12 per cent. on		
	167 shares in shares		
	of Rogers Locomo-		
	tive Co., 240½ shares,	\$24,050	
(b) Sept. 26.	144 1-12 per cent. on		
	83 shares in shares		
	of Rogers Locomo-		
	tive Co., 119½ shares,	11,950	
		<hr/>	36,000."

The above items marked (a) and (b) were not received by the complainant as trustee, but as attorney of Theodore B. Rogers, who was the owner of the above-mentioned 83 shares.

The Rogers Locomotive & Machine Works has already distributed to its stockholders in the process of liquidation, \$6,100,000, which is more than 2,000 per cent. on its capital stock of \$300,000, and there are still assets to be divided.

The following is a partial statement of the assets of the company on or about February 15, 1893, as shown by the amounts already distributed to the stockholders:

Argument for defendant.

Plant sold to Rogers Locomotive Company,	\$2,750,000
Cash divided in 10 installments of 100 per cent. each	3,000,000
Stocks divided, valued at	350,000
	<hr/>
	\$6,100,000
	<hr/>

It appears that the present trustee has already received from the Rogers Locomotive & Machine Works, the following cash and securities as its shares of the divisions made in liquidation:

Cash, 9 payments, each \$25,000,	\$225,000
Cash, 1 payment	16,700
	<hr/>
	\$241,700
Stock Rogers Locomotive Co., 2,500 shares; stock Rogers Locomotive Co., 240½ shares; 2,740½ shares, at \$100.....	274,050
Stock N. C. & St. L. R. R., 187½ shares, at \$70	13,125
Stock L. & N. R. R. Co., 150 shares, at \$52	7,800
Stock Ill. Cent. R. R. Co., etc., 100 shares, at \$88	8,800
	<hr/>
	\$545,475
	<hr/>

The trustee has paid and transferred to Theodore B. Rogers his share under the will of all the securities and moneys received on the stock of the Rogers Locomotive & Machine Works, the shares of the sons of the tes-

Argument for defendants — Opinion.

tator being payable to them absolutely on attaining twenty-one years of age.

The present trustee has received from admitted income up to November, 1893, the sum of \$6,141.43, in excess of what was sufficient to pay the annuity of \$5,000, and the expenses of the trust, and one-third of this sum has been paid to Theodore B. Rogers, one-third carried to the principal accounts of Helen R. Bradford and Annie R. du Pont, respectively. Since that time, such excess of income has been paid in equal parts to the three children of the testator, pursuant to the order of the Chancellor, made December 2, 1893.

WOLCOTT, CHANCELLOR.—Theodore Rogers, late of New Castle Hundred, in New Castle County, and State of Delaware, died during the month of October, A. D. 1871, having first made and published his last will and testament, bearing date the 14th day of January, A. D. 1867, which was duly admitted to probate by the register of wills in and for said county. The testator, by his will, appointed his three brothers — Jason Rogers, Jacob S. Rogers and Columbus B. Rogers — executors and trustees thereunder. Letters testamentary were in due form of law issued unto Jacob S. Rogers and Columbus B. Rogers, the surviving executors under said will, who accepted the trust therein created, the said Jason Rogers, the other executor, having predeceased the testator.

By said will, the testator gave, bequeathed and devised all his estate, real, personal and mixed, whether in the State of Delaware or elsewhere, now in possession or hereafter to be acquired, unto his said three

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brothers, the survivor or survivors of them, subject to the following uses, purposes and trusts:

1st. In trust, to hold his mansion, farm and all the personal property situated thereon, for the sole use and benefit of his wife, for the term of her natural life, or during widowhood, and after her death, or marriage, for the use of his son, Theodore B. Rogers, until he shall have attained his majority; and so soon as he shall arrive at the age of twenty-one years, or if he shall have arrived at the age of twenty-one years when the marriage or death of his said wife occurs, then to grant, convey and deliver the same to his said son, Theodore B. Rogers, absolutely; but, if after the marriage or decease of his said wife, his said son shall die before arriving at the age of twenty-one years, then the same to fall into his residuary estate, and if his said wife shall survive his said son, then at her marriage, or death, the same shall fall into and become a part of his residuary estate.

2d. In trust to pay each and every year out of the income of his estate, to his wife, Mary N. Rogers, so long as she shall live and remain his widow, the sum of \$5,000, to be paid to her in two equal semi-annual payments; the first payment to be made within six months after his death. And after the marriage, or decease, of his said wife, so much of the capital of his estate as may have been held to answer said annuity, shall also fall into and become a part of his residuary estate.

3d. In trust to hold all the rest and residue of his estate, under and subject to the following interests, purposes and trusts, that is to say, in trust to apply so much of the income thereof as the trustees may deem proper to the support and education of his children, and the

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issue of any deceased child or children, during their respective minorities.

4th. In trust, when his first child shall have attained the age of twenty-one years, to divide his residuary estate, which he defines to be "his whole estate," except that portion thereof devised in the first section of his will for the use of his wife, Mary N. Rogers, and his son Theodore B. Rogers, and, except further, such principal or capital sum as may be sufficient to produce the yearly bequest given and granted to his said wife, if she shall then be his widow, into so many parts or shares as there may be children and deceased children leaving lawful issue, at the time of the division. The testator then directed as follows:

"And as my daughters respectively arrive at twenty-one years, to pay over to them respectively the income of their respective shares of my estate, for and during their natural lives, upon their own receipts only, and for their separate use and benefit, free from the control of any husband; the payments to be made annually, or oftener, as the same may become due."

Then follows a limitation over after the decease of any of his daughters, to such uses as she shall by will appoint, and in default of such appointment, to distribute her share among her children, etc.

By item 6th, he ordered his executors, in their discretion, to convert into money, any of his residuary estate, real or personal, and reinvest the same in certain prescribed securities.

Item 7 provides as follows:

"I hereby declare that my said executors shall stand possessed of the accumulations of my residuary estate

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and the income thereof, upon and for the same trusts and subject to the same declarations hereinbefore made concerning the estate, or part or share of my estate, from which such accumulations shall have proceeded."

Item 8 is as follows:

"I declare that if any portion of my estate shall fall into and become a part of my residuary estate, after the period of division mentioned in section 4, then the same shall be subject to division and distribution, and held and assigned in like manner and for the same uses as are declared concerning the other part of my residuary estate."

The testator left to survive him a widow, Mary N. Rogers, who is still living and unmarried, and three children, namely, Annie R. du Pont, Theodore B. Rogers and Helen R. Bradford, all of whom are still living and over twenty-one years of age.

On the 4th day of May, A. D. 1879, Annie R. du Pont, the eldest child of the testator, arrived at her majority, and the trustees, pursuant to the authority contained in item 4 of the will, divided certain of the funds and securities, and transferred to themselves, as trustees for each child, the cash and securities allotted to each one. They retained the following securities to raise the annuity for the widow:

Two hundred and fifty shares of the Rogers Locomotive & Machine Works, par value, \$25,000, inventoried at \$31,000.

Three hundred and thirty-four shares of the Patterson & Hudson R. R. Co., par value, \$15,700, inventoried at \$15,700.

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Three hundred and sixty-three shares of Patterson & Ramapo R. R. Co., par value, \$18,150, inventoried at \$18,150. Aggregate appraised value, \$64,850.

They also retained the balance of the securities, amounting to \$135,477.50, under the general trust of the will.

On April 16th, 1891, they made a second division of cash and securities among the children of the testator, the trust estate having greatly increased in value by the accumulations of income, and the enhancement in the value of the investment, and retained for the general trust the three securities above named, which, in the opinion of the trustees, were then worth \$552,275, the stock of the Rogers Locomotive & Machine Works being estimated by them to be worth \$500,000.

On June 20th, 1891, upon their own petition, Jacob S. Rogers and Columbus B. Rogers relinquished the trusteeship, and the Equitable Guarantee & Trust Co. was appointed trustee, and the above-mentioned securities were transferred to the new trustee.

The Rogers Locomotive & Machine Works made regular semi-annual cash dividends from 1872, to January, 1893, of 10 per cent., except from July, 1876, to July, 1883, when the dividends were 5 per cent. semi-annually.

At a meeting of the stockholders of the Rogers Locomotive & Machine Works, held February 15th, 1893, it was resolved:

"That it is the sense of this meeting that the offer of Robert S. Hughes be accepted, and that the board of directors proceed to make sale of the plant in accordance

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with the details and particulars specified in a memorandum of sale and schedule presented by the president of this meeting, and that the board of directors be authorized to accept the sum of \$2,750,000 in the common stock of the Rogers Locomotive Company, in payment of said property.

"That upon the sale being made, as in the former resolution, the directors proceed to wind up and dissolve the corporation pursuant to the charter."

The schedule referred to in the above-quoted resolution included a very large amount of land, buildings, boilers, machinery, tools, materials on hand, water rights, good-will, contracts and orders on hand, drawings, patterns, and all personal property on the land of the company. It included every asset of the company, except cash and securities on hand, and bills receivable, and debts due and owing to the company.

The sale of the plant was subsequently consummated, the company ceased to do business, and proceeded to wind up its affairs preparatory to a final dissolution.

On March 7th, 1893, the directors resolved, that a dividend be made to the stockholders, of ten shares of Rogers Locomotive Company, on every share of the stock of the Rogers Locomotive & Machine Works, and pursuant to this, the trustee received twenty-five hundred shares of stock of Rogers Locomotive Company, par \$100.

On March 16th, 1893, the directors resolved,

"That a division be made of 100 per cent. of the cash assets, being the amount of the principal or par of the stock." Pursuant to which, the trustee received \$25,000 in cash.

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On March 27, 1893, the directors resolved,
“That a division be made to the stockholders of the following assets in kind:

Seventy-five per cent. in stock of Nashville, Chattanooga & St. Louis Railway Co.

Sixty per cent. in stock, Louisville & Nashville R. R. Co.

Forty per cent. in stock, Illinois R. R.'s leased lines.”

All of which the trustee in due course of time received.

At eight other times, from April 3d, 1893, to November 13th, of the same year, the directors of the Rogers Locomotive & Machine Works adopted the following resolution:

“*Resolved*, That a further dividend or division of the assets in liquidation be made of 100 per cent. in cash and 144 1-12th per cent. in stock of Rogers Locomotive Co.” Pursuant to which the trustee received \$16,700 in cash, and 240½ shares in stock of Rogers Locomotive Company.

All the payments, dividends and divisions made to the stockholders since February 15th, 1893, were indorsed on the certificates of 256 shares of stock in the Rogers Locomotive & Machine Works.

It having become very evident that the cash and securities received by the trustee, and by it held for the purposes of the general trust, were far in excess of what was necessary to raise the annuity of \$5,000 for the widow, the trustee filed a bill for instructions as to the distribution of such excess.

On the 2d day of December, A. D. 1893, the court, by consent of the solicitors for the complainant and de-

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fendants, and without prejudice to either party as to the further questions arising under the pleadings reserved for future argument, ordered,

First. That \$25,000 in cash, and \$125,000 in specified securities, should be held by the trustee out of the funds in its possession for the raising and securing an annuity of \$5,000, payable under the will of Theodore B. Rogers, to his widow during her life or widowhood.

Second. That one-third of the residue of the undivided assets, held by the complainant as trustee, be paid over and transferred to the son of the testator absolutely, under the express terms of the will, and that the excess of income arising from the money and securities so ordered to be held by said complainant for the purpose of raising said widow's annuity, above said annuity, and all expenses attending the execution of said part of said trust, shall be paid over by said trustee as income, in equal shares, to Annie R. du Pont, Theodore B. Rogers and Helen R. Bradford, said testator's children.

One of the questions reserved is, are the two daughters of the testator entitled to have paid to them their respective shares of all excess of income received in ordinary cash dividends, above the annuity of \$5,000, arising from the fund set apart and held by the original trustees to raise said annuity prior to the order of this court, December the 2d, 1893, or is it to be held as a part of the principal or *corpus* of their respective trust estates?

To determine this question, it is proper to consider, in the first place, from what period the children of the testator were entitled to a definite share of the income produced by the *corpus* of the trust estate, under the

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language in which the trust is expressed. It must be borne in mind that the whole estate of the testator, except certain realty and personalty given in trust for the special use and benefit of the widow and son, and the amount necessary to raise the widow's annuity, was to be held in bulk until the eldest child attained the age of twenty-one years. The income was also to be held in like manner for a like period, subject to the payment thereout of so much thereof as the trustees might deem proper for the support and education of testator's wife and children, or the legal issue of any deceased child or children.

The eldest child, Mrs. du Pont, completed her twenty-first year, May the 4th, 1879, at which time the residuary estate was to be divided into as many shares or parts as there might be children, and deceased children leaving lawful issue at the time of the division, and thereafter the income earned by each of those shares was to be held by the trustees separately, and not thrown into a common fund.

The testator had only three children, all of whom were living at the time the division was to have been made, thus making the fund divisible into three equal parts or shares.

It is immaterial, however, for the determination of this cause whether the whole of the residuary estate was so divided at the period prescribed by the will or not, inasmuch as it comes within the principle, that whatever ought to be done is considered in equity as done. And for the sake of convenience, it may be stated here, that the residuary estate was the whole estate, diminished by the separation therefrom of the portion de-

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vised to the widow and son, and so much only as would be necessary to produce the widow's annuity. I shall, therefore, throughout this opinion, treat the excess of capital held by the trustees for the use of the widow during her life or widowhood as a part of the residuary estate, as further on it is more elaborately noticed.

By the admissions and exhibits in this cause, it appears that the income thus held in bulk exceeded the expenditures in behalf of the support and education of the children. Consequently, between the death of the testator (which occurred in October, 1871) and the period for division, the annual excesses of income aggregated a large amount. What that amount now is, however, is not important to consider, as we are endeavoring only to discover the principle by which to determine its quality; whether capital or income.

The testator evidently contemplated the existence of an unexpended income, in the hands of the trustee, every year after they assumed the responsibility of administering and executing the several trusts imposed upon them; but notwithstanding this, he gave no direction to distribute this excess as income among the chosen objects of his care and bounty, either before or after the division. Neither were the trustees required to keep it as a separate and distinct fund for any general or particular purpose, as none was indicated or expressed in any clause or part of the will. What object, then, could there have been in continuing to treat it as income? None whatever, for the children were amply provided for up to the period fixed for the division. If the testator had survived their minority, he could not have made a more wise and judicious provision for them

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than he did do by his will. If he had died intestate, the law would have made the same, certainly no better provision. In such case, their guardians would have been permitted to use only so much of the income as would have been proper for their support and education. So that, the testamentary provision made was not incompatible either with the tender and generous instincts of the parent, or the humane provisions of the law.

This excess of income, therefore, being unrestrained by any express or implied direction of the testator, obeyed the law or tendency of its nature and fell into and became a part of the parent or general estate, in which its identity as income was completely lost.

If the view I have taken needed reinforcement, it would only be necessary to refer to the language employed by the testator to describe the whole of his property devised and bequeathed in trust to his executors, for the various purposes subsequently named in his will, and the language employed by him to describe his residuary estate which he directed to be divided as before mentioned. His entire estate, in the clause creating the general trust, is comprehended under the phrase "all my estate, real, personal and mixed, whether in the State of Delaware or elsewhere, now in possession or hereafter to be acquired." His residuary estate is defined as, "my whole estate," except that portion thereof devised in the first section of his will, for the use of his wife and son, and except, further, such principal or capital sum as may be sufficient to produce the widow's annuity. There is no dispute that the words "all my estate," as used in the one case, included income as well as capital. If so, upon what ground can the words "my

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whole estate," as used in the other case, be held to be exclusive of income? — the only difference being in the words "all" and "whole." They are both descriptive of the word "estate," and are equally broad and comprehensive in their import. Any attempt to draw distinction between their natural scope and effect would be a labor devoid of any discoverable aim or end, unless their ordinary signification is modified or varied by other language in the will. As before seen, there is no language in the whole will to so separate the capital from the income, as to require a special mention of both by their technical names, in order to combine or consolidate them into one fund, namely, the residuary estate.

Again, at the time of the execution of his will, the estate of the testator, no doubt, consisted of both capital and income, the respective of which identities were just as capable of ascertainment at that time as at any time after his decease. He used the term "estate" intelligently, intending to embrace therein all his property in whatever form it may have existed, without specifically mentioning the classes and subdivisions of which it was composed, barring the well-known legal distinction between real and personal property. The testator must have known that if an ordinary degree of prosperity continued to attend his business affairs, his estate in the hands of the trustees would, when the period fixed for the division thereof should arrive, consist of both capital and income, just as his entire estate did at the time of the making of his will, whether in the same or in dissimilar proportions. Therefore, if he had intended to restrict the application of the term "estate,"

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as used in directing the division of his residuary estate, to capital alone, or to any particular portion of his property, the unavoidable presumption is that he would have used appropriate language to accomplish that purpose, without leaving the executors or trustees to grope their way amid the subtleties and refinements of the law to discover some hypothetical testamentary intention. Had he had such an intention as imputed to him by the solicitors for the respondents, he would naturally (having fixed the meaning of the word "estate" by the broad sense in which he first used it), have limited it by such restrictive words as "my whole estate, exclusive of accumulations down to date of division then directed."

But the solicitors for the respondents attempt to meet this view by insisting that the *corpus* or capital of the estate must be ascertained as of the date of the death of the testator, or, at the furthest, one year thereafter. In other words, the residuary estate at the present period of division, in contemplation of the testator, was no more than the *corpus* of the entire estate thus ascertained, less the portions excepted therefrom as before mentioned.

In the argument, it was assumed that this contention was sustained by several cases cited under appropriate heads in the respondent's brief. But a careful examination of the facts in those cases forces the mind to the conclusion that the case in hand clearly falls without the rule of construction laid down and approved in those cited. This case and those cited differ in their essential facts. The latter, in each instance, grew out of a gift or bequest of a certain fund in trust to pay the income arising therefrom to certain persons during their lives absolutely, and at the expiration thereof, to pay the

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corpus to certain other persons in the same manner. The payment of the income was made just as absolute as the payment of the principal. In none of these cases, however, was a definite time prescribed by the testator when the income should begin to accrue or the payment thereof to be made. The courts were, therefore, invoked to fix such time, and in doing so, fixed it, in some instances, at the death of the testator, and, in others, one year thereafter — the period generally allowed for the settlement of estates. The former would seem to be more in harmony with the true intent of the testator than the latter, since it puts into immediate effect the testamentary intention. This rule of construction is certainly a very wise and beneficent one, as it tends, under certain conditions, to prevent a partial abortion of the testator's intent, yet it must not be stretched so far as to destroy the very purpose it was intended to serve. In the present case, the testator did fix the time (and this in the most definite manner possible) at which the income should be payable to his children, namely, as they respectively arrived at their majorities, but he did more than this; he did not leave his children uncared for during their minority, but, on the contrary, made ample specific provision for them during that period. In the light of the parental care manifested by the testator, and the definiteness of the language used, where is the reason for the application of such a principle or rule of construction? What is the ground for a just and equitable collision between the interests of the life beneficiaries and the remaindermen, as measured and determined by the express language of the testator, which calls for the interference of this court?

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The next question to be determined is, whether Mrs. Bradford, on her arrival at full age, was entitled to receive the unexpended income which had accrued on her share of the residuary estate from the period of division, that is to say, the income arising from the one equal third part of the entire residuary estate, including the amount over and above that which was actually necessary to raise the widow's annuity.

The testator, in item 4 of his will, among other things, directs that the trustees shall, as his daughters respectively arrive at twenty-one years of age, pay over to them respectively the income of their respective shares of his estate. This is the first time that he directs anything to be paid to his daughters directly. . He does not say whether it is income *to* accrue, or income which *has* accrued. The direction is broad enough to cover both. It is true that in item 7 of his will, the testator declares that his said executors shall stand possessed of the accumulations of his entire estate and the income thereof for the trusts therein mentioned. The accumulations here referred to, however, relate to the entire period covered by the lives of the life beneficiaries, but the accumulations or income which we are now considering, relate to a particular part only of that entire period, and to a particular portion of the income. We are, therefore, presented with a case where two intentions appear upon the face of the will; not, however, in material conflict with each other, but the one, a general intent for a general period, and the other, a particular intent for a particular period, and a particular portion of the estate. In such a case, it is manifestly proper to treat the latter, or particular intent, as an

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exception to the former, or general intent. This question at least involves such a doubt as should be resolved in favor of the life beneficiary, Mrs. Bradford. I, therefore, direct that such unexpended income shall be paid to Mrs. Bradford out of the general funds in the hands of the trustee.

The remaining question is, whether the various sums of money and securities received by the trustee upon the shares of stock of the Rogers Locomotive & Machine Works should be held by it as part of the principal or part of the income of the trust fund.

Thus far, I have not invoked the accumulation clause in aid of the interpretation or construction of the will. It is certain, however, that the testator must have intended it for some purpose, but, unless it is held to be applicable in determining how this large bulk of property remaining in the hands of the trustees shall be disposed of, it would seem that item 7 was idly inserted in the will. To give such an interpretation as would make this section a nullity, would be to violate the fundamental rule of construction, which holds as sacred the full intention of the testator. I am bound, therefore, to treat this provision as of vital force in controlling the distribution of this fund. Accordingly, it remains now to discover the meaning of item 7 of the will. The controlling idea of the testator in the disposition of his property, so far as his two daughters are concerned (after making ample provision for their support and education during minority), was to restrict them to the enjoyment of the income arising from their shares of his residuary estate and its accumulations.

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He did not leave this intention to the surmise or conjecture of courts, but expressed it in such clear and explicit language as to leave no room for substantial doubt or controversy. It would be difficult to discover words more clearly indicative of such intent than those which he used in this very section itself. They are as follows: "hereby declare that my said executors shall stand possessed of the accumulations of my residuary estate and the income thereof upon and for the same trusts," etc.

Referring to the 250 shares of stock in the Rogers Locomotive & Machine Works, what are we to understand by the word "accumulations?" What does it embrace? Are not accumulations the yearly earnings and profits of a corporation, in whatever form they may exist, which had not been distributed in dividends among the owners of the stock at the time it went into liquidation? If they are not, it would be impossible to assign a definite meaning to such a term, or to draw the line of distinction between income and accumulations. It is very unreasonable to suppose that the testator, when he used this language, had in mind the period of one year allowed by law for the settlement of estates. To have limited this language to that time would have required express words showing such an intent.

The testator did not leave it to the actions of the executors, to determine what should be embraced in this term, for, by declaring that his executors shall stand possessed of the accumulations, etc., he expressly shows that he designed to include accumulations which were in

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the sole custody and control of the corporation as they accrued.

It would be purely a work of supererogation to review the authorities cited as to the meanings of the terms "accumulations" and "income," for the reason that the testator has in his own language practically defined them himself in the sense in which he intends to use them. It is hardly necessary to add, that a different interpretation, or such an one as insisted upon by the solicitors for the respondents, would have the effect of giving to his daughters absolutely the greater part of his estate, when from the whole context of the will it is manifest that he designed them to be life beneficiaries merely, taking nothing in derogation of the remaindermen.

But it is contended by the solicitors for the respondents, that the appraised value of the stock set apart by the trustees as the fund out of which to raise the widow's annuity, is the basis by which to fix the residuary estate, so far as that stock is concerned, and that the whole of the amount by which its real value overtops its appraised value, must be taken as income belonging to the daughters. To hold to such a contention would be to make the rights of life beneficiaries and remaindermen alike dependent upon the action of the appraisers, perhaps upon their whim or caprice. These rights are, however, fixed by the will itself. It is to that instrument that we must turn in defining the rights and the interests of the beneficiaries.

It is also contended by the solicitors for the respondents, that 250 shares of stock in the Rogers Locomotive & Machine Works, does not constitute any part of the

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testator's residuary estate, as the trustees retained the same in specie down to the present time, as a part of the principal or capital, to raise the widow's annuity.

This stock, according to their contention, is expressly excluded from the residuary estate, because the testator himself declared that his residuary estate should be the whole of his estate, except the portion thereof devised for the special use of his widow and son, and the amount set apart by the trustees sufficient to raise her annuity. This contention must also fail, because the trustees were only authorized to set apart a *sufficient* amount to raise the annuity of \$5,000. They had no power to set apart another dollar than that sufficient for this purpose. To concede that they had the power under the will to set apart a greater sum than that, would be equivalent to giving them the power to reduce the residuary estate to such a nominal sum as would not produce sufficient income for the support and education of the children during minority, and in fact to thwart the clear intention of the testator. Therefore, the residuary estate must be the whole of the testator's estate, less the portion devised for the use of the widow and son in the first item of the will, and only such an amount of the capital as would be sufficient to raise the widow's annuity, and it was this which was divided, in the contemplation of the testator, at the period fixed for the division. Therefore, all the divisions of cash and securities in the treasury of the Rogers Locomotive & Machine Works, by whatsoever name called, that have been paid or delivered to the present trustee since February 15, 1893, or may hereafter be paid or delivered, must be treated as capital and not income.

Syllabus — Statement — Opinion.

MARY MCGRENRA v. CATHERINE MCGRENRA.

Orphans' Court, New Castle, September Term, 1890.

Dower — loss of, by adultery and desertion.

Where the wife of one of the members of a copartnership, formed for the purpose of conducting the hotel business, having left him and lived in open adultery with another man, because she could not monopolize, or at least participate in the management of the said hotel in connection with the other copartners, he having offered her another home in which to live, and he not having subsequently been reconciled to her and suffered her to dwell with him, Held, that the wife would be barred from claiming dower in his estate by section 9, chapter 87, Revised Code.

APPLICATION FOR ASSIGNMENT OF DOWER.—Petition of Mary McGrenra for assignment of dower in the estate of her deceased husband.

Thomas Davis and Daniel Bratton, for petitioner.

Willard Saulsbury, for respondent.

GRUBB, J.—This case arises upon the petition of Mary McGrenra, widow of Cornelius McGrenra, for the assignment of her dower out of certain real estate therein described, known as the Delaware House, hotel and stables, in the city of Wilmington.

The petition sets forth that the petitioner intermarried with the said Cornelius McGrenra, October 19,

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1868; that he died December 2, 1889; that he was seized in fee of the said real estate during their marriage, and that whilst he was so seized thereof, and after they were so intermarried as aforesaid, he conveyed said real estate to his sister Catharine McGrenra, the respondent, without the petitioner becoming a party to and joining in said conveyance.

All of the foregoing facts were admitted or proven at the hearing of this cause.

Against the petitioner's application for dower, the respondent interposed the following pleas:

1. That no such person exists or is now living as Mary McGrenra, widow of Cornelius McGrenra.

2. That the petitioner is not Mary McGrenra, widow of Cornelius McGrenra.

3. *Ne unques accouple.*

4. That under the law, the said Mary McGrenra, if living, has forfeited her right to any dower in Cornelius McGrenra's lands, or any lands of which he was ever seized.

5. That the petitioner has forfeited her dower in said lands by adultery.

6. That the petitioner did willingly leave her husband and go with an adulterer, and thereby forfeited her right of dower in said lands.

7. That the petitioner did willingly live in adultery in a state of separation from her husband, not occasioned by his fault.

At the hearing, the allegations of the first, second and third pleas were not established by the evidence, but the contrary.

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If it shall be determined that the allegations of the *seventh* plea have been sustained by the evidence introduced in the cause, then it will be unnecessary to consider and pass upon either the sufficiency of the remaining pleas or the adequacy of the testimony in support thereof.

Said seventh plea is founded upon the second provision of section 9, chapter 87 of the Revised Code.

According to the true meaning and intent of this statutory provision, the petitioner's dower in the real estate in question must be held by this court to have been forfeited if it shall appear, upon due consideration of all the evidence in the cause, that the petitioner did "willingly live in adultery in a state of separation from her husband, not occasioned by his fault," unless it shall also appear that her said husband did, subsequently thereto, become "reconciled to her and suffer her to dwell with him."

Therefore, the chief questions presented by the issue raised upon said *seventh* plea, and to be determined by the evidence relevant thereto, are,

First. Did, or not, the petitioner willingly live in adultery in a state of separation from her husband, Cornelius McGrenra?

Second. Was, or not, said state of separation from him occasioned by his fault within the meaning and intent of said statutory provision?

Third. If both of these inquiries be determined adversely to the petitioner, did, or not, the said Cornelius McGrenra, subsequently to the petitioner's guilty con-

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duct, become reconciled to her and suffer her to dwell with him?

It has been conclusively proven that the petitioner left the house of her said husband and lived apart from him for a considerable time in Delaware, and then went to Pennsylvania and lived in Philadelphia in a complete and continuous state of separation from him, from the winter of 1874 until his death in December, 1889.

The respondent has produced both oral and written evidence to prove that within this period and during the year 1879, the petitioner lived in adultery in Philadelphia, with a certain James Andrews, to whom she was married by a Catholic priest, at the Roman Catholic Cathedral, corner of Eighteenth and Race streets in said city, in August of that year, and by whom she was then pregnant with a male child, of which she was delivered on October 31, 1879, and whom she named Robert Andrews.

The petitioner herself has testified that she lived in Philadelphia with a Mrs. Young, from 1874 until her death in the spring of 1879, and that she adopted the name of Mary Andrews in lieu of Mary McGrenra whilst she was living with Mrs. Young.

By her own testimony, therefore, it appears that she bore the name of Mary Andrews as early as the spring of 1879.

Mrs. Rebecca Byrne, a witness in behalf of the respondent, testifies that a Mary Andrews was employed with her at the Girard House about the end of April, 1879, and that, about the month of June in that year, she learned from her own lips that she was then preg-

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nant by a man named James Andrews, who visited her frequently at the Girard House, and whom she represented to Mrs. Byrne to be her husband.

Mrs. Byrne declares that shortly after the close of the summer of 1879, her husband, William Byrne, having informed her that Mrs. Andrews had been married to James Andrews as late as August of that year, she visited Mrs. Andrews at her rooms over a saloon at the corner of Thirty-third and Market streets, Philadelphia, and found her still pregnant. She next visited her at the residence of Mrs. Jarvis, an obstetric nurse, No. 3533 Filbert street, the day after her child was born, and saw both her and the child there during this and one or two subsequent visits. She subsequently visited Mrs. Andrews several times at her apartments over a saloon at Fourth and Bainbridge streets, where she saw both James Andrews and her child with her. She had also met her frequently at the house of Charles and Julia Ferguson, and had also introduced Dr. Charles Wirgman to her. Mrs. Byrne fixes the pregnancy and marriage of Mrs. Andrews, as becoming known to her, during the summer immediately following her own marriage in April, 1879, and she declares that she positively, and without any doubt, recognizes the petitioner to be the same Mrs. Andrews of whom she has testified.

Charles Ferguson and Julia, his wife, both testify that in the summer Mrs. Andrews came to their house in a pregnant condition, and from the Girard House as she said, and informed them that a man named James Andrews was the father of her child.

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At her instance, they saw Andrews and induced him to marry her. She boarded at their house two or three weeks before this marriage, at which they say they were present as witnesses thereto in the Cathedral at Eighteenth and Race streets, Philadelphia. Shortly after this marriage she left their house. They afterwards saw her in a disreputable looking house over a saloon at Fourth and Bainbridge streets with her child, a boy, named Robert Andrews, and the said James Andrews. They state that she first came to their house a year or more before this marriage, representing herself to be a widow named Mrs. McGrane; that they gave her employment; that she called upon them occasionally, and the petitioner is, without any doubt, the same person whom they knew as Mrs. McGrane and Mrs. Andrews.

Mrs. Ferguson also states that several months after the marriage, she took the child, which was then sickly, from Fourth and Bainbridge, and had it baptized for Mrs. Andrews at St. Philip's Church. In this, Mrs. Ferguson is corroborated by the baptismal record of said church, which shows that on August 1, 1880, a child named Robert Andrews, born October, 1879, son of James Andrews and Mary Dugan, was baptized there, and that Julia Ferguson was godmother for it.

Dr. Charles Wirgman testifies that he attended Mary Andrews at No. 3533 Filbert street, Philadelphia, where she gave birth to a boy in the presence of Mrs. Jarvis, now Mrs. Marshall. This was (as he says he remembers after having refreshed his memory by his note-book) on October 31, 1879. The birth of this child as the

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son of James and Mary Andrews, named Robert Andrews, born October 31, 1879, at 3533 Filbert street, he says, he duly reported, as was his duty, to the registration department, Philadelphia; and in this he is corroborated by the record of said department. During this confinement he made several visits to her. A few years after her confinement he attended her on Spruce street, below Twenty-second street, during a different illness. He also, subsequent to her confinement, attended her husband, James Andrews, during his illness at Fourth and Bainbridge streets, where he found her living with him. He says he is satisfied that the petitioner is, without doubt, the Mary Andrews whom he attended upon the occasions he has stated.

Mrs. Christina Marshall testifies that prior to her marriage to her present husband, she was Mrs. Jarvis, and resided at 3533 Filbert street, Philadelphia, as an obstetric nurse.

She states that on October 31, 1879, Hallowe'en, Mary Andrews was there delivered of a male child, whom they named Robert Andrews. She came from over a saloon at Thirty-third and Market streets to her house a few weeks before her confinement, and remained there under her care until after Christmas, when she left her house and took the boy to Fourth and Bainbridge, Philadelphia.

Dr. Wirgman attended her during her confinement; Mrs. Jarvis first met Dr. Wirgman at Mrs. Rebecca Byrne's. James Andrews visited Mary Andrews during the illness following her confinement, and she represented him to be her husband. Mrs. Jarvis, at the re-

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quest of Mrs. Andrews, subsequently to her confinement, visited her and took care of her child at Fourth and Bainbridge.

Mrs. Marshall (formerly Mrs. Jarvis) again saw Mrs. Andrews about two years ago, when the latter informed her that her husband, James Andrews, was in the asylum, and that her child Robert was in the country. She also testified that Mrs. Andrews had once told her that her name was Mary Dugan.

That a woman was married in Philadelphia during the summer of 1879, to a man named James Andrews, by whom she was then pregnant, and, under the name of Mrs. Mary Andrews, was, on October 31st of that year, delivered of a male child at the house of Mrs. Jarvis, No. 3533 Filbert street, is undoubtedly proven in this case.

But the petitioner contends that, although she had assumed the name of Mrs. Mary Andrews during the spring of 1879, yet she is not the Mary Andrews who was married to James Andrews and bore the child in question.

In support of this contention she has produced witnesses, some of whom testify that they saw her on the Hallowe'en of 1879, and others that they saw her so short a time before that date that she could not have been then pregnant, or they would have observed it; and all of whom declare that that they did not see any indications of her being then pregnant, and do not believe that she was then pregnant, or could have been delivered of a child either on or about October 31st of that year.

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With the exception of Grace M. Tait, all of the witnesses called for this purpose by the petitioner say that they saw the petitioner on or near the Hallowe'en of 1879, and that they knew it was at this precise time, because when they saw her she was concerned about the trouble of her brother, Hugh Dugan, who was tried at the November Court at New Castle in that year, and who was convicted and sentenced to five years' imprisonment.

But it must be observed that they are testifying about her appearance and condition so long as ten years ago, when her husband, Cornelius McGrenra, was still alive, when consequently she might have been lawfully pregnant by him, and when, therefore, such a condition might not have especially impressed itself upon their memories, or even excited any particular notice.

Again, it must be remembered that Hugh Dugan was tried in December, and not in November, 1879. It is not improbable, therefore, that Mrs. Sayers, Grace Sayers, the Morgans, and possibly some of the other witnesses, may have seen her on or near Thanksgiving Day, instead of on or near Hallowe'en, and, therefore, in November instead of October, 1879, and consequently after her child was born at Mrs. Jarvis' house. Indeed, as Hugh Dugan was sentenced in December, 1879, to five years' imprisonment, and, therefore, continued in "trouble" for that space of time, it is not altogether improbable that the petitioner's visits to Wilmington, and her concern in his behalf, may have been after his trial and during 1880, instead of during 1879, as her witnesses have supposed and testified.

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After so many years, such a mistake might very naturally and readily be made.

Lizzie A. Morgan testified that her mother, Mrs. Mary Morgan, has a "very poor memory — too bad a memory to recollect well," and that she was herself only nine years old at the time of the occurrences which she has undertaken to describe.

Again, Miss Tait, although she professes to have been an intimate acquaintance of the petitioner, acknowledges that she did not know where she lived or worked after the spring of 1879; that she had never called upon the petitioner, and that the latter had never called upon her except at Wanamaker's store, where she was employed. Under these circumstances, it is not improbable that she failed to notice her pregnancy, especially in such a crowded store, even if it be certain, which it is not, that the petitioner called upon her at all during the summer or fall of 1879, for Miss Tait was unable to state positively any precise date when she called at the store, or even to show how she knew with certainty that she had called at all during that portion of 1879.

Upon careful consideration of the evidence produced on both sides, the conclusion is unavoidable that the petitioner has failed to impeach the credibility of the respondent's witnesses, and to disprove their explicit and positive identification of the petitioner as the person who, in 1879, was married to James Andrews, and delivered of a male child of which he was the father.

It does not appear that the respondent's witnesses on this subject are parties to, or in any way interested in, this suit; nor that they are relatives or personal friends,

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or even acquaintances of the respondent; nor is it shown that they are not entirely unbiased and impartial witnesses. The evidence shows that each of them had ample opportunity to become thoroughly acquainted with the personal appearance and characteristics of the petitioner, and this under such peculiar circumstances as to have impressed these strongly and distinctly on the memory of each. All of these witnesses saw her more or less frequently for a greater or less period subsequent to her confinement; and both Charles Ferguson and his wife Julia say that on the Sunday next before the delivery of their testimony in this very case, the petitioner called at their house in Philadelphia, and urged them in a threatening manner not to appear in this court to testify against her.

It is true that Herman Peaper and wife, and Ellen Wynn, were produced by the petitioner to impeach this testimony of the Fergusons, but their testimony was too inconsistent, indefinite, and unsatisfactory to be sufficient for this purpose.

Again, there are certain significant coincidences between the facts established by the testimony of the petitioner and those proven by the witnesses produced by the respondent, which serve to corroborate the latter's identification of the petitioner. The petitioner herself has shown that her maiden name was Mary Dugan; that she was born in Donegal, Ireland; that she assumed the name of Mrs. Mary Andrews while she was living in Philadelphia with Mrs. Young, who, she says, died in the spring of 1879; that she afterwards lived at Mrs. Davids', on Spruce street, between Twenty-first and

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Twenty-second; that in 1885, and subsequently, she had a registered residence at No. 231 North Sixteenth street, and that in 1885 or 1886 she was employed at the Blockley Hospital.

These identical facts are proven in relation to the Mary Andrews regarding whom the respondent's witnesses have testified. Dr. Wirgman says that subsequent to the year 1879, he called upon the Mary Andrews, whom he had delivered of a male child in that year, and again attended her on Spruce street, below Twenty-second (the locality of Mrs. Davids' residence), and that this Mary Andrews had told him about her having nursed a Mrs. Davids.

Mrs. Julia Ferguson says that she once had an interview with the Mrs. Mary Andrews regarding whom she testified, during which said Mrs. Andrews informed her that she was then at Blockley Hospital.

Mrs. Marshall states that the Mary Andrews who was delivered at her house No. 3533 Filbert street, in 1879, once informed her that her name had been Mary Dugan.

The baptismal record of St. Philip's Church shows that the mother of the child Robert Andrews, for whom Mrs. Ferguson testifies that she had the child there baptized, was Mary Dugan, and that its father was James Andrews.

Lastly, the respondent has put in evidence a bond to the St. John's Orphan Asylum, Philadelphia, upon the binding thereto of a boy named Robert Andrews, on December 17, 1887. This bond is signed by Mary Andrews, the mother of the boy, and is accompanied by

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the application and specifications required to be presented prior to the taking of the bond in such cases. In view of the testimony in this case, it appears to be satisfactorily proven that this bond was signed by the petitioner, and that the accompanying application and specifications were furnished by her to the proper officials of the asylum. Whilst without the statements contained in this bond and application there is ample evidence establishing the said identification of the petitioner, yet it is deemed proper to call attention to the significant facts therein disclosed. They show that the name of said boy was Robert Andrews; that his residence at the time of said application was 231 North Sixteenth street, Philadelphia; that the date of his birth was October 31, 1879, and the place thereof Thirty-sixth and Filbert street; that he was baptized at St. Philip de Neri Church; that his father's name was James Andrews, Norristown Asylum; that his mother's maiden name was Mary Dugan, and her native place Donegal, Ireland.

It only remains to be stated that when the petitioner was called to testify in rebuttal in her own behalf, she did not deny that she had signed said bond or presented said application and specifications to the proper officials of said asylum.

It having been established that the petitioner did willingly live in adultery with James Andrews in a state of separation from her husband, Cornelius McGrenra, during and after the year 1879, the next practical inquiry is, was, or not, said state of separation from him occasioned by his fault within the meaning and intent

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of said statutory provision upon which the seventh plea is founded?

The purpose of said provision is to extend a compassionate leniency to the erring wife who has yielded to temptation under the pressure of distress and adversity, occasioned by the gross misconduct of her husband. This wise clemency of the law is not extended, however, where the fault of the husband is of a trivial character, otherwise the sanctity of the marriage relation could not be preserved, or the cause of morality and decency maintained. Nor is it extended to the wife where the state of separation from the husband is occasioned by her own gross misconduct.

In the present instance, it is proven that in January, 1868, Cornelius McGrenra purchased the said Delaware House, hotel and stable properties, with the financial aid of his sisters, Mrs. Meenan and Catharine McGrenra, the respondent, with the view of conducting therein the hotel business in partnership with his said sisters, they to attend to the kitchen and general housekeeping, and he to manage the remaining part of the business. Under this arrangement the three took possession of said properties on March 25, 1869, and conducted the hotel until about the close of the year 1872.

On or about said March 25th, the petitioner, having been married to Cornelius McGrenra in October, 1868, was brought to his home in the hotel. In the course of her testimony at the hearing of this cause, the petitioner declares that about August, 1869, she left her home in the hotel and remained at her father's house until about November, 1870, because she was abused and subjected to various annoyances by her husband's

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sisters, and no sufficient provision was made there for her proper accommodation and comfort, or for her approaching confinement. At her husband's request, she returned to the hotel about November, 1870, but left on the same day, because she was, as she says, abused and beaten by her husband's sisters, Mrs. Meenan and Catharine, and returned to her father's, where she remained until about May, 1872, when at her husband's request she again returned to the Delaware House with her child Frankie, and remained about two weeks only. During this period, about June 7, 1872, she had an altercation in the kitchen with the respondent Catharine, whom she shot, as she declares, in self-defense. The next day after the shooting she left the hotel, but a few days subsequently returned for some clothing, when she was again abused by Catharine, and thereupon she left the hotel and never again attempted to make her home there.

The truth of all these alleged reasons for leaving her home in the Delaware House is flatly denied not only by the respondent upon the witness-stand, but also by Frank Woods and Harriet Brown, two disinterested witnesses, who were employed as servants in said hotel. They declare the petitioner, during her entire residence there, was treated in all respects as well as if she were a lady boarder in the hotel; that she took her meals at the regular table; was given the second-story bed chamber adjoining the parlor, it being the best room in the house, and had her wants always attended to and supplied by them and the other employees of the hotel under her husband's express instructions to them. It is also testified by them that when she lived in the hotel

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she caused discord and trouble there, but when she was away from it peace and order prevailed. They also testified that she repeatedly interfered with the respondent's management of the kitchen work, and quarreled with her when there was no necessity for her to be in the kitchen at all, and that about June 7, 1872, this conduct finally culminated in a murderous assault by the petitioner with a loaded pistol upon the respondent, without legal provocation or justification. They state that prior to this occasion the respondent had always treated her in a lady-like and kindly way. They also declare that her husband always treated her with gentleness and kindness, and never otherwise, although upon various occasions she cursed him, beat him with her fists, attacked and drove him from the house with a stone, domineered over him and abused and worried him until she drove him to excessive drinking.

Although the petitioner has testified that she was beaten by Mrs. Meenan and Catharine, she nowhere states that her husband ever struck her or treated her with cruelty. She does say that he would not permit her or her child to have a physician, but Dr. Maull disproves this. She has also testified and shown by other witnesses that her husband would at times be manifestly under the influence of liquor and sometimes intoxicated. But she acknowledged that she knew of this infirmity prior to her marriage. Having married him, therefore, after due notice of his infirmity, she took him "for better, for worse," and consequently her obligation was the greater and her duty the plainer so to conduct herself as to moderate and not aggravate this propensity.

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The conclusion, clearly warranted by due consideration of the entire evidence produced to show by whose fault the state of separation proven to have existed during the year 1879 and thereafter was occasioned, is this: The petitioner, notwithstanding that she was supplied by her husband with a home and the comforts and attentions fully corresponding with both his and her station of life, nevertheless perversely resolved not to accept and adapt herself to these unless she could monopolize, or at least participate with her husband's sisters in, the control and management of the hotel. This idea was as impracticable as it was unreasonable. Her husband was not then in a position, owing to his need of the financial aid of his sisters, to dissolve his partnership with them, expel them from the premises, and conduct the hotel alone, or in connection with his wife. Nor was he able to force her upon his sisters as a copartner with them. It was her duty, therefore, to accept the home he gave her, especially when she was there provided, as was clearly proven, with every reasonable comfort and attention. Instead of doing this, she rebelled against his sisters' rightful control of the kitchen and household affairs, and frequently and unreasonably interfered with their management of these. This course of misconduct on her part, being persisted in, developed in her a quarrelsome, violent and dangerous disposition, which repelled the friendship of her husband's sisters and excited their ill-feeling against her and created the discord and strife which finally culminated in her murderous and unjustifiable assault with a pistol upon the respondent in June, 1872, and made her further resi-

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dence in the hotel impossible so long as her husband's sisters retained their partnership interest therein.

At this juncture, as Patrick Haggerty has proven, he offered her one of his houses on Ninth street in Wilmington, and a home with him there apart from his sisters, which she refused to accept.

Thenceforth, by her own fault, she lived separate from his house and home.

Distressed in spirit, and worried in mind by the consequence of her misconduct towards his sisters and himself, he gradually indulged more frequently and more freely in intoxicating liquors, until having lost his wife by desertion and his property by sheriff's sale, he thereafter became disheartened and desperate, and after years of excessive intemperance, closed his unhappy career in death at the house of his sister, the respondent, who, from the date of the petitioner's desertion of him, had given him a sheltering home and the pitying care which his own wife withheld.

It is scarcely necessary to add that there is absolutely no proof that Cornelius McGrenra, subsequent to the petitioner's said guilty conduct in willingly living in adultery with James Andrews in a state of separation from her husband not occasioned by his fault, did ever become reconciled to her and suffer her to dwell with him.

The respondent's said seventh plea having been established by the evidence in this cause, it is, therefore, now ordered, adjudged, and decreed, that the prayer of the petitioner be refused, and that her petition be dismissed, with costs.

APPENDIX.

Chancellor JAMES L. WOLCOTT.

James L. Wolcott was born February 4, 1842, at the home of his father on a farm in Mispillion Hundred, Kent county, Delaware, about a mile and a half east of the town of Harrington.

His parents were Josiah and Elizabeth (Dorman) Wolcott. His boyhood was spent in the plain simple life of the farm. After having exhausted the educational opportunities afforded by the schools of his neighborhood as a pupil, he proceeded to take the post of teacher in the same schools where he had been taught. Later he studied law at Dover, and at the end of the prescribed period was duly admitted to practice in the courts of this State.

For some years after his admission to the bar, Mr. Wolcott appears to have had little desire for active practice. Much of his time was devoted to self-education through systematic and general reading. It was not until his marriage with Mary M., daughter of Alexander Goodwin, that he threw himself into active professional work. From that time, however, he acquired a widespread and enviable reputation as a brilliant and successful attorney and jurist.

In 1871, he was elected Clerk of the Senate. He was counsel for the Levy Court of Kent county from 1871

to 1879. In the latter year, he was appointed Secretary of State by Governor Hall. May 5, 1892, he was appointed Chancellor of the State by Governor Reynolds to succeed the late Chancellor, Willard Saulsbury, and held this post until November, 1895, when he resigned the office to resume his private practice and more particularly to act as counsel for the Delaware Railroad Company. From that date up to the very day of his death, March 31, 1898, he devoted his whole time and industry to one of the largest clientages in the State.

His death was most sudden and unexpected.

James L. Wolcott was a man of marked legal acumen. His arguments to the court and to the jury were characterized by a clearness of reasoning and an eloquence of expression rarely excelled. Although filling the post of Chancellor for but little more than two years, he left upon the State judiciary the imprint of his strong mental force. His decisions were received by the bar with a confidence in their soundness, testifying to the high respect accorded to his judicial ability.

Few, if any, in this State, have received higher eulogiums than were written and spoken throughout Delaware after his death. I give the following as illustrative of the deep love and veneration in which he was held by the people generally of his native State:

“ ‘ We do feel in his loss a grievous burden has been placed upon us, for death hath garnered in one among the goodliest of our brethren, among the brightest of our calling, a leader among us, and our common friend.’—
From the Kent County Bar Resolutions.”

Death can never be truly called a little thing. Sorrow and pain and grief must always follow in its track,

be its mark high or low, of the great or of the humble. But there are degrees in the suffering which death inflicts, and differences in the number it affects. Men are so taught, from their earliest moments of reasoning, to look upon its coming as the inevitable and unescapable, that when one of their fellows receives the fatal call, they experience pity and regret, but leave the poignancy of true sorrow to those bound by ties of blood or close association. It is only in those cases of one great in mind, or in heart, or in both, that the loss becomes a common grief, and sorrow a visitant to all.

Such was the death of James L. Wolcott.

In the midst of the loss to this State and this community through the death of this man, there seems a singular weakness and commonplaceness in all eulogy. Praise cannot add one cubit to his soul's stature; nor blame take one tittle from his just fame. Yet even in the useless tributes to the dead, there is a certain relief for the living.

With the common run of men, the mere accidents of life, birth, location and environment, are the all-controlling factors. Greatness or genius is required to overcome such things.

With James L. Wolcott it may be truly said, what he was and is (for with such a man, death cannot make of his deeds and influences a thing of the past) himself and his creator made him.

Beginning at the bottom, with but few advantages, he climbed steadily, ever upward; the defects of a finished education he supplied by omnivorous reading, coupled with a clear and discriminating judgment; with only the average advantages of a law student, he made of himself

an acknowledged leader of the bar; untaught in elocution or oratory, he made for himself a name as a speaker, who for ringing and moving earnestness has rarely been equaled in our State; and, above all and more than all, he made for himself, through his integrity of character, his sympathy and generosity, a household name among the many who knew him as he was.

It is not our purpose to enter into the details of his active life. Our people knew him, knew his deeds and knew his worth which shone through them. The memory of them and of him will not soon be swallowed up in his death.

It was not any technical knowledge of the law that gave him distinction in his profession, but that breadth of intelligence and clearness of comprehension which led him unerringly to the vital point in issue in every case. Added to this, he possessed an earnestness of manner and an eloquence of speech which made his every argument well-nigh resistless. Some score or so of his speeches to juries will remain in the memories of those who heard them, as almost matchless in their passionate fervor, their clearness of reasoning and their moving effect.

As Chancellor, no man could attribute to him partisanship, or question his ability or peculiar fitness for such a post.

His resignation from this high office was but typical of his inner nature. Those who knew him understood that his judicial position seemed to him to prevent in some degree that freedom and openness of intercourse with his fellow men that he so dearly prized. The highest judicial office in the State was not so high in his eyes as the unreserved companionship of his friends.

There was to him absolutely no distinction between the high and the low, the great and the small, the rich and the poor; and no distinction upon such lines ever appeared in his conduct toward them.

Nothing more beautiful, and nothing more true, can be said of James L. Wolcott than that his loss will not bear so heavily upon the wealthy and the great as upon the poor and the humble.

This is his greatest glory. The past has given, and the future will bring, lawyers equal or superior to him, speakers, perhaps, as brilliant, men to take the posts he had filled in public life; but who can supply the place he held in the hearts of the people for whom his office and his home were ever open and free with charity, with sympathy and friendly counsel?

The manner of this man's death was only in harmony with his life. It was as if death knocked and said,—“Lo, I am here”—and he replied,—“Enter, there is no need for tarrying; I am ready.”

While the suddenness of his death is still a stunning shock to this entire community, to him it meant a happy and peaceful close to a happy and peaceful life. There was no twilight with him — first, the day of light and life and color, and then — the stars.”

HENRY RIDGELY, Jr.,
Dover, Delaware.



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ACCOUNT. See EXECUTORS AND ADMINISTRATORS, 1.

ACCUMULATION.

A testator devised all his estate to trustees in trust to hold all the rest and residue of his estate (after reserving as much of the securities as they might deem necessary to raise a certain annuity for his widow), in trust to apply so much of the income thereof as they might deem proper to the support and education of his children during their minority, and in trust when his first child should attain the age of twenty-one years, to divide his residuary estate into so many shares as there were children at the time of the division; and as the children arrive respectively at their majorities, to pay over to them respectively the income of their respective shares of his estate, for the term of their natural lives, etc. In section 7 of the will, the following occurs: "I hereby declare that my said executors" (trustees) "shall stand possessed of the accumulations of my residuary estate and the income thereof, upon and for the same trusts and subject to the same declarations hereinbefore made concerning the estate from which such accumulations shall have proceeded."

a. Held, that the accumulations, enhancements and increase in certain stocks forming a part of the estate from the death of the testator up to the majority of the eldest child, the period fixed by the will for the division, were to be treated as a part of the *corpus* or capital of the estate and subject to the declaration of trust, and not as income to be paid to the children absolutely.

b. But held, also, that such accumulations, enhancements and increase on the share of the youngest child from the majority of the eldest to her own majority, would go absolutely to her as income.

c. Held, also, that all excess in the amount reserved by the trustees for the raising of the widow's annuity over and above what was necessary, was a part of the *corpus* or capital of the estate, and not income.

d. Held, also, that the word "accumulations," as used in section 7, would cover the yearly earnings and profits of a

ACCUMULATION — *Continued.*

corporation in which the testator held stock, in whatever form they might exist, which had not been distributed in dividends among the owners of the stock at the time it went into liquidation. *E. G. & T. Co. v. Rogers et al.*, 398.

ADULTERY.

Where the wife of one of the members of a copartnership, formed for the purpose of conducting the hotel business, having left him and lived in open adultery with another man, because she could not monopolize, or, at least, participate in the management of the said hotel in connection with the other copartners, he having offered her another home in which to live, and he not having subsequently been reconciled to her and suffered her to dwell with him,—Held, that the wife would be barred from claiming dower in his estate by section 9, chapter 87, Revised Code. *McGrenra v. McGrenra*, 432.

AFFIDAVIT.

1. When petitioned to restrain a supposed insane person from control over his property during pendency of lunacy proceedings, the Court of Chancery should not examine into the case more than is necessary to move it to grant the order for the protection of the alleged lunatic's person and estate; and, therefore, counter affidavits, negating the allegations contained in the sworn statements of the petitioner, will not be heard. *In re Harris*, 42.

2. The petition for a restraining order is but collateral to the proceedings in lunacy, and dependent upon it for its foundation, and the affidavits upon which the lunacy proceedings are founded may be used in aid of this application. *Id.*

ANSWER.

The statement in the petition for a restraining order during the pendency of lunacy proceedings, supported by affidavit, that respondent has parted with large sums of money without receiving a visible equivalent therefor, will prevail against an answer which denies the respondent's mental incapacity, and his being under the influence of any persons for any purpose whatever, but does not specifically deny that statement in the petition; and is *prima facie* evidence of the incompetency of the respondent to govern himself and manage his estate, and justifies the Court of Chancery in granting such order. *In re Harris*, 42.

ASSIGNMENT. See CORPORATION, 6.

ATTACHMENT.

1. A person cannot be punished for the performance of an act which is prohibited by an order or decree of the court which has never been published. *Jessup & Moore Paper Co. v. Ford*, 226.

2. On attachment for contempt for not obeying an injunction, where the evidence on both sides is so strong and irreconcilable as to raise a grave doubt, the rule will be discharged. *Id.*

3. Where a decree *pro confesso* was entered with an order for "attachment in thirty days" for failure to comply with it, and the decree was not performed, and it appeared that the respondent, although owning valuable real estate, was unable to raise the requisite amount, an attachment was refused and a writ of sequestration granted. *Allen et al. v. Leach*, 232.

BOOKS OF CORPORATION.

The books of a corporation are private. They are not public records, open to the inspection either of the public or a creditor of one of the stockholders. *Allen v. Stewart et al.*, 287.

BY-LAW.

The provisions of the by-laws of a corporation defining a mode of transferring shares of stock, do not exclude all other modes, unless the charter, or some general law, negatives any other mode of transfer. *Allen v. Stewart et al.*, 287.

CODICIL.

1. In order that a codicil shall operate as a revocation of any part of a will, in the absence of express words to that effect, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention. They are both supposed to be made and executed with the same solemnity and deliberation, and, therefore, both are entitled to the same degree of consideration. The will and the codicil constitute part of the same testament, and they are each, in legal estimation, equally sacred and inviolate. Any part of the one, not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language. *Bringhurst v. Orth et al.*, 178.

2. In the construction of a will with a codicil annexed, any part of the one, not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language. *Id.*

CODICIL — Continued.

3. The term "issue," used in a codicil, and the term "heirs-at-law," used in a will, when employed to denote the beneficiaries and not to limit the quantity or duration of an estate in lands, are not, of necessity, so contradictory as to lead to a revocation of the provision of the will. *Id.*

4. In one of the items of her will, the testatrix provided that "if any of the devisees or legatees in this my will named, shall die before me, then the said devises and legacies shall not lapse, but shall pass and go to such person and persons as would be the heirs-at-law of such devisee or legatee under the intestate laws of the State of Delaware." In the codicil to said will, it was provided that, "in case of the death before my death of any of the legatees or devisees named in my will, the shares of those dying before me, to go to their issue, the said issue to take the share of their deceased parent, except as to any share which would go to S. D. P.," etc. Held, that the codicil did not revoke the quoted provision of the will, and that the shares of certain legatees dying before the testatrix without issue, did not lapse. *Id.*

COMBINATION. See **PILOTS**, 1, 2.

CONDEMNATION. See **EMINENT DOMAIN**.

CONSTRUCTION. See **WILL**.

CONTEMPT.

1. A person cannot be punished for the performance of an act which is prohibited by an order or decree of the court which has never been published. *Jessup & Moore Paper Co. v. Ford*, 228.

2. On attachment for contempt for not obeying an injunction, where the evidence on both sides is so strong and irreconcilable as to raise a grave doubt, the rule will be discharged. *Id.*

CONVERSION.

1. It is a well-settled rule in equity, that land directed to be converted into money, or money into land, will be considered as that species of property into which it is directed to be converted. It is equally well settled, that the beneficiaries under a will, in which their interests arise from money, or land, ordered to be converted into one or the other, take as legatees or devisees according to the nature or quality of the property in its converted state or condition. *In re Journey*, 1.

CONVERSION — *Continued.*

2. A devise to a wife for life, and after her death, the land to be sold and proceeds divided among the children, share and share alike, gives a vested interest to the children, and the legal estate and title descends to the children and vests in them between the death of testator and actual conversion by sale. *Id.*

3. The testator, by item 2 of his will, devised to his wife, M. J., a farm during her life; and at her death, directed same to be sold, and the proceeds thereof to be equally divided among his children, share and share alike. *Held,—*

a. That the interest to the children was a vested one, and that grandchildren took their parent's share.

b. That the legal estate in the land, between the death of the testator and the actual conversion of the same, descended to the children of the testator; and,

c. That one of the said children who lived on the land for a period between the death of the tenant for life and the sale of the land, was liable to the other children either on a contract for rent, or in case for use and occupation, less the value of permanent improvements made by him. *Id.*

CORPORATION.

1. The provisions of section 18, chapter 147, volume 17, Delaware Laws, Revised Code, 576, that "the shares of stock in every corporation in this State shall be deemed personal property, and shall be transferable on the books of the corporation in such manner as the by-laws shall provide, and whenever any transfer of shares shall be made for collateral security, and not absolutely, the same shall be so expressed in the entry of such transfer," does not make an assignment on the books of the corporation necessary, to vest title in a transferee of shares of stock. *Allen v. Stewart et al.*, 287.

2. An assignment on the books of a corporation is not necessary in order to vest title in the transferee of shares of stock, either in the case where the by-laws of the corporation are silent upon transfers, or in the case where its by-laws do define a mode for such transfer, *unless* the charter or some general law expressly requires an assignment on the books. *Id.*

3. The provisions of the by-laws of a corporation defining a mode of transferring shares of stock, do not exclude all other modes, unless the charter, or some general law, negatives any other mode of transfer. *Id.*

4. In the absence of any statutory provision, or of a by-law upon the subject, shares of stock in a corporation are transferable as any chose in action, and like them, the transfers of stock may be either legal or equitable. *Id.*

CORPORATION — *Continued.*

5. The books of a corporation are private. They are not public records, open to the inspection either of the public or a creditor of one of the stockholders. *Id.*

6. C. W. E., who was president of the J. P. Co., being indebted to complainant, gave him a bond, and assigned, as collateral security, 200 shares of stock in said company and a policy of insurance. Coupled with such assignment was a written agreement between them, that complainant would not interfere with the management of the said company, would retransfer a certain part of said stock upon payment of a certain part of said indebtedness, or would retransfer the whole of said stock upon payment of the whole of said indebtedness; but that on failure of the conditions of said bond, or to keep up said insurance policy, said assignment of the stock and the policy should become absolute. The transfer of said stock was not made on the books of said company, but notice of the transfer was served on C. W. E. as its president. The charter and by-laws of the company were entirely silent as to the transfer or assignment of shares of stock. Subsequently, T. S., one of the defendants, recovered a judgment against C. W. E., issued a *fi. fa.*, with clause of attachment, and attached said 200 shares of stock, and advertised same for sale. On bill to enjoin the sale of said shares of stock by T. S.,— Held, that it was not necessary that the shares should be transferred on the books of the company, and that the injunction should be granted. *Id.*

See EMINENT DOMAIN.

CREDITOR.

Equity looks not so much at the form of a debt as to the good faith in which it was made or created. The law recognizes diligence in creditors and gives them a preference according to the rank or grade of their debt; equity, however, imputes no particular merit to diligence unless the advantage thereby acquired amounts to a lien, or some vested right or interest which neither equity nor law will allow to be disturbed. In *re Lord & Polk Chemical Co.*, 248.

DEBT. See CREDITOR; INSOLVENCY.

DECREE PRO CONFESSO.

1. A decree *pro confesso* against an administrator, is a decree in form, *de bonis testatoris*, and if there are tangible assets in his hands, then process appropriate to that form can alone be had; but if a *derastavit* has been committed, and there are no available assets, then recourse may be had against him in his individual capacity. *Allen et al. v. Leach*, 232.

DECREE PRO CONFESSO — *Continued.*

2. Bill filed by complainants, legatees, to recover their legacies from the respondent, the administrator, on two accounts corrected on exceptions by the Orphans' Court; the respondent pleaded *laches*, Statute of Limitations, and a pending right of appeal, but failed to add the affidavit that said pleas were not made for delay; complainants moved for a decree *pro confesso* for want of such affidavit, which was granted "or attachment in thirty days;" on expiration of this time, and failure to comply with this decree, complainants moved for a rule to show cause why decree had not been performed, or why attachment should not issue, which was refused, it appearing that respondent, although owning valuable real estate, was unable to raise the requisite amount. Held, that a writ of sequestration *de bonis propriis* should be granted, a *devastavit* having been committed. *Id.*

DEED.

M. B., being the owner of one-fourth interest in certain lands, made a deed in trust to E. B., for her own benefit, with power to the trustee to sell on her written order. J. P. purchased and obtained a deed for the other three-fourths interest in said lands, and also paid to M. B. the price for her said one-fourth interest, and obtained a deed from E. B., the trustee, therefor. This last deed purported to be an execution of the power to sell contained in the original trust deed, but referred to no written order from M. B., except by stating that M. B. had written a letter stating that "I give my sanction to the arrangement mentioned in Joseph's letter, and desire Edward to do what is needful," which said letter was written by M. B. as and for such an order. J. P. went into possession of said lands and occupied same for over twenty years. Afterwards, upon the death of E. B., the trustee, a deed of confirmation of said last deed was made to J. P. by the eldest male issue of the trustee, and by all the heirs-at-law of M. B., she having also died. There were judgments against two of the said heirs prior and at the time of the execution of said last deed of confirmation. On bill for specific performance by J. P. against H. Y., on an agreement by H. Y. to purchase a clear title to said lands, free of incumbrances,—Held, that J. P. could give such a title. *Parker v. Yerger*, 208.

DEMURRER.

1. Whenever a want of proper parties appears on the face of a bill, the proper mode to take advantage of this objection is by a demurrer. *Mayor et al. v. Addicks et al.*, 56.

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DEMURRER — Continued.

2. A mere reference in the bill to an alleged corporation, coupled with an express denial of its legal existence, is not a fatal admission on a demurrer for want of parties. If defendants rely upon such actual existence, a different mode of pleading must be adopted. *Id.*

3. A demurrer to a bill admits to be true all the facts as therein set forth. *Id.*

4. The mayor and council of Wilmington, at the instance of the individual members of the board of directors of the street and sewer department of said city, filed a bill to enjoin certain individuals from opening the streets of said city, to lay gas pipes, without the previous consent of said board. Defendants demurred on the ground that the bill alleged that said defendants were acting as officers and agents of the Oxy-Hydrogen Company, of this State, and that, therefore, said company should have been made a party defendant. Held, that the demurrer must be overruled, for the reason that the bill only stated that individual defendants claimed to act as such officers and agents and expressly denied the actual existence of said company; and that the demurrer, admitting all the facts in the bill, admitted the truth of such express denial of the actual existence of such company; that if the defendants relied upon such actual existence, they should have adopted some other mode of pleading. *Id.*

DESERTION.

Where the wife of one of the members of a copartnership, formed for the purpose of conducting the hotel business, having left him and lived in open adultery with another man, because she could not monopolize, or at least, participate in the management of the said hotel in connection with the other copartners, he having offered her another home in which to live, and he not having subsequently been reconciled to her and suffered her to dwell with him,—Held, that the wife would be barred from claiming dower in his estate by section 9, chapter 87, Revised Code. *McGrenra v. McGrenra*, 432.

DEVASTAVIT.

1. In a suit against an executor or administrator, when he has been guilty of neglect or waste, he necessarily appears in a double role, as a defender of himself in both his representative and individual character. If his liability as the representative of the deceased is established, it would be conclusive as to his liability as an individual co-extensive with that as administrator. The liability in either case is as-

DEVASTAVIT — *Continued.*

certained in the same way, and by the same degree of proof. The defenses are also the same. *Allen et al. v. Leach*, 232.

2. If an executor or administrator in a suit against him in his representative capacity, pleads *plene administravit*, and on issue it is found against him, his liability to the extent of assets found in his hands, is fixed; and if they be not forthcoming, he must answer out of his own property. *Id.*

3. The word "administrator" is descriptive only of the person who has taken upon himself the responsibility of administering the estate of a deceased person. As to the property of the deceased, the administrator stands in his place to dispose of it as the law directs. When the heirs or creditors desire to reach it, it can only be done through himself, and whenever it is found that a *devastavit* has been committed, his own property can alone be reached through the same channel. *Id.*

4. Bill filed by complainants, legatees, to recover their legacies from the respondent, the administrator, on two accounts corrected on exceptions by the Orphans' Court; the respondent pleaded *laches*, Statute of Limitations, and a pending right of appeal, but failed to add the affidavit that said pleas were not made for delay; complainants moved for a decree *pro confesso* for want of such affidavit, which was granted "or attachment in thirty days;" on expiration of this time, and failure to comply with this decree, complainants moved for a rule to show cause why decree had not been performed, or why attachment should not issue, which was refused, it appearing that respondent, although owning valuable real estate, was unable to raise the requisite amount. Held, that a writ of sequestration *de bonis propriis* should be granted, a *devastavit* having been committed. *Id.*

See DECREE PRO CONFESSO.

DEVISE.

1. A devise to a wife for life, and after her death, the land to be sold and proceeds divided among the children, share and share alike, gives a vested interest to the children, and the legal estate and title descends to the children and vests in them between the death of testator and actual conversion by sale. *In re Journey*, 1.

2. The testator, by item 2 of his will, devised to his wife, M. J., a farm during her life; and at her death, directed same to be sold, and the proceeds thereof to be equally divided among his children, share and share alike. Held,—

a. That the interest to the children was a vested one, and that grandchildren took their parent's share.

DEVISE — Continued.

b. That the legal estate in the land, between the death of the testator and the actual conversion of the same, descended to the children of the testator; and,

c. That one of the said children who lived on the land for a period between the death of the tenant for life and the sale of the land, was liable to the other children either on a contract for rent, or in case for use and occupation, less the value of permanent improvements made by him. *Id.*

See WILL; LEGACY AND LEGATEE.

DILIGENCE.

Equity looks not so much at the form of a debt as to the good faith in which it was made or created. The law recognizes diligence in creditors and gives them a preference according to the rank or grade of their debt; equity, however, imputes no particular merit to diligence unless the advantage thereby acquired amounts to a lien, or some vested right or interest which neither equity nor law will allow to be disturbed. *In re Lord & Polk Chemical Co.*, 248.

DOWER.

1. Where testator's will was not discovered until after death of his widow, she having then had no opportunity to elect to take in dower or as a legatee thereunder, the court will make that election for her which will be most advantageous to her estate. *Spruance v. Darlington*, 111.

2. Where the wife of one of the members of a copartnership, formed for the purpose of conducting the hotel business, having left him and lived in open adultery with another man, because she could not monopolize, or, at least, participate in the management of the said hotel in connection with the other copartners, he having offered her another home in which to live, and he not having subsequently been reconciled to her and suffered her to dwell with him,—Held, that the wife would be barred from claiming dower in his estate by section 9, chapter 87, Revised Code. *McGrenra v. McGrenra*, 432.

ELECTION.

1. Where testator's will was not discovered until after the death of his widow, she having then had no opportunity to elect to take in dower or as a legatee thereunder, the court will make that election for her which will be most advantageous to her estate. *Spruance v. Darlington*, 111.

2. Except through *laches* or waiver, the power of election of a landowner, whose property is taken, under the right of eminent domain, cannot be lost, except by such a selection

ELECTION — Continued.

of one of the subjects or rights embraced by the election, as confers a positive right to the subject or right so selected, upon the party in whom the election once existed. Williams v. O. & M. R. Co., 303.

EMINENT DOMAIN.

1. It is the settled law of this State that the condemnation proceedings alone establish nothing, vest nothing, and fix nothing except only the price at which the land inquired upon may be had from the proprietor by the corporation. Williams v. O. & M. R. Co., 303.

2. The award of freeholders on condemnation proceedings does not, of itself, render the corporation liable to the landowners for the amount fixed by the award. Id.

3. Upon an abandonment by a corporation, after condemnation proceedings, of a proposed route, the corporation is liable not only for the cost of such condemnation proceedings, but also for all damages and expenses reasonably incurred by the owners of land along such abandoned route, by reason of those proceedings. Id.

4. Except through *laches* or waiver, the power of election cannot be lost, except by such a selection of one of the subjects or rights embraced by the election, as confers a positive right to the subject or right so selected, upon the party in whom the power of election once existed. Id.

5. In order to constitute such a location of the route of a railroad in this State as will exhaust the power of eminent domain conferred in its charter, some acts must be done which vest mutual rights or liabilities between the corporation and landowners along such route. Id.

6. A location is not a mere right, it is an act; it is not a power to do a thing, it is the thing itself. Id.

7. Difference between the English law in regard to railroad corporations and condemnation proceedings, and that in this State. Id.

8. By the charter of the O. & M. Railway, the respondent, it was provided "that the said company shall have power to locate, survey, and purchase such lands and rights of way within the limits of New Castle County as said company may deem necessary for their purpose," the termini being specified; and by another provision of the charter, the mode of having freeholders appointed for inquisition and condemnation proceedings was fixed, and it was then provided that "the said freeholders, or a majority of them, shall certify their finding and award to both parties, whereupon the said company, upon paying the damages so assessed, or depositing the same in the N. C. N. Bank, to

EMINENT DOMAIN — *Continued.*

the credit of said owner or owners, shall become entitled to have, use, and enjoy said lands and rights of way for the purpose of said company forever." The respondent proceeded to survey its proposed route. Being unable to agree as to the price of the lands desired, condemnation proceedings were had under its charter. The respondent and all parties interested were present, either in person or by attorney, during these proceedings and at the announcement of the award. Immediately upon this announcement, the respondent asserted that the damages fixed were more than it could pay, and notified the freeholders that it was unnecessary to serve notice of the award as provided in its charter. No such notice was in fact served, and neither the whole nor any part of the damages were paid, tendered, or deposited as provided in the charter. Subsequently, the respondent applied for and secured the appointment of another set of freeholders for the condemnation of a right of way over another and entirely different route. Held, that the survey and condemnation proceedings over the first route did not exhaust the power of eminent domain conferred upon the respondent by its charter, and that it had the right to change its first proposed route. *Id.*

EVIDENCE.

1. When petitioned to restrain a supposed insane person from control over his property during pendency or lunacy proceedings, the Court of Chancery should not examine into the case more than is necessary to move it to grant the order for the protection of the alleged lunatic's person and estate; and, therefore, counter affidavits, negating the allegations contained in the sworn statements of the petitioner, will not be heard. *In re Harris*, 42.

2. The petition for a restraining order is but collateral to the proceedings in lunacy, and dependent upon it for its foundation, and the affidavits upon which the lunacy proceedings are founded may be used in aid of this application. *Id.*

3. The statement in the petition for a restraining order during the pendency of lunacy proceedings, supported by affidavit, that respondent has parted with large sums of money without receiving a visible equivalent therefor, will prevail against an answer which denies the respondent's mental incapacity, and his being under the influence of any persons for any purpose whatever, but does not specifically deny that statement in the petition; and is *prima facie* evidence of the incompetency of the respondent to govern himself and manage his estate, and justifies the Court of Chancery in granting such order. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. Section 21, article 6 of the Constitution provides that the executor, administrator or guardian shall, within three months after settlement of his account, give notice in writing to all persons entitled to shares of the estate, or to their guardians, respectively, if residing within the State, that the account is lodged in the office of the register of wills for inspection. Until this notice is given, the Statute of Limitations cannot be pleaded to exceptions to the account, notwithstanding the statute which provides that "no exceptions to an account of an administrator, executor or guardian, settled by the register for the county, shall be received and filed in the Orphans' Court after the expiration of three years from the settlement of said account." *Allen et al. v. Leach*, 83.

2. An administrator depositing money belonging to the estate in a bank, in his own name, becomes thereby personally liable to the estate for the same, though it was lost by the failure of the bank with which the deposit was made. *Id.*

3. An executor, administrator, or guardian should not place money belonging to the estate or ward with a private banking institution. *Id.*

4. The holding by an executor or administrator of money belonging to the estate beyond the time for distribution is a failure of duty which forfeits his right to commissions. *Id.*

5. Revised Code, chapter 89, section 12, which declares that all "lawful" acts of an executor who has been removed shall be deemed valid, does not embrace a claim to be credited with the erection of a monument over the grave of the deceased. the expense of which is unauthorized by law. *Spruance v. Darlington*, 111.

6. As against an executor's cause of action for assets of the estate against one who acted as executor under a will which was afterwards found to have been revoked, the Statute of Limitations does not begin to run until letters of administration have been granted to the executor properly appointed. *Id.*

7. The Statute of Limitations does not begin to run against the right of legatees under testator's true will, discovered after his estate had been administered under a supposed will, until the granting of letters of administration under the former; they supposing their right settled under the revoked instrument, and so accepting them. *Id.*

8. A paper writing purporting to be the last will and testament of K. D., was duly admitted to probate, and letters of administration granted to M. D., his widow, as executrix. M. D. had the personal property of the deceased appraised, paid various legacies bequeathed in the paper

EXECUTORS AND ADMINISTRATORS — *Continued.*

writing to certain minors, to the parents of said minors, took various parcels of the real estate as one of the devisees, and collected rents of same, paid taxes and repairs. M. D. afterwards died, having devised certain of the property obtained from the estate of K. D. Subsequently a later will of K. D. was discovered and allowed by the register. Held,—

a. That the estate of M. D. could not receive credit for the legacies paid to the parents of the minors; otherwise, if M. D. had paid them to their accredited guardians.

b. That the estate of M. D. was liable for the amount of the appraisement of the personal property of K. D.

c. That the estate of M. D. could not be credited with the rents collected and money expended for repairs.

d. That the estate of M. D. could, however, be properly credited with the sums laid out in the payment of the debts of K. D.; otherwise, for the expense of a tombstone over the grave of K. D., that not being a legal charge. Id.

9. Under a will directing the executor merely to sell testator's real property, and divide the proceeds in a certain manner, the title thereto in fee descends to his heirs-at-law, subject to the power to sell, and they alone are entitled to the rents and profits thereof from the death of the testator up to the time of the exercise of the power to sell. Id.

10. When no time is fixed by the testator for the division of the estate directed in the will, it becomes the duty of the court to fix such a time as will best aid in carrying into effect the uses, intents and purposes for which the trust created in the will was established. *Frost v. McCaulley et al.*, 102.

11. The testator, by will, gave his executors power to incurber his estate at their discretion, and then sell it and divide the proceeds into eleven shares. As to the last of these shares, he provided as follows: "The income of one other, and the last of said shares or parts, I give to F. H. F., payable half yearly for ten years, after which time I give the same to her absolutely." In another part of the will, he provided that: "And I hereby authorize my executors and trustees, at their discretion, to pay to any of my children who may need it, such sums from time to time, before the estate is settled, as they may deem needful and proper; the same to be accounted for as part of the income of their shares in my estate respectively." Held,—

a. That the gift to F. H. F. was an absolute vested legacy, but that it would have been otherwise had it been a gift of the principal, without the gift of the income during the interval between the death of the testator and the expiration of ten years thereafter.

EXECUTORS AND ADMINISTRATORS — *Continued.*

b. That the ten years is to be calculated from the date of the death of the testator and not from the date of the settlement by the executors. *Id.*

12. A decree *pro confesso* against an administrator is a decree, in form, *de bonis testatoris*, and if there are tangible assets in his hands, then process appropriate to that form can alone be had; but if a *devastavit* has been committed, and there are no available assets, then recourse may be had against him in his individual capacity. *Allen et al. v. Leach*, 232.

13. In a suit against an executor or administrator, when he has been guilty of neglect or waste, he necessarily appears in a double role, as a defender of himself in both his representative and individual character. If his liability as the representative of the deceased is established, it would be conclusive as to his liability as an individual coextensive with that as administrator. The liability in either case is ascertained in the same way, and by the same degree of proof. The defenses are also the same. *Id.*

14. If an executor or administrator in a suit against him in his representative capacity, pleads *plene administravit*, and on issue it is found against him, his liability to the extent of assets found in his hands, is fixed; and if they be not forthcoming, he must answer out of his own property. *Id.*

15. The word "administrator" is descriptive only of the person who has taken upon himself the responsibility of administering the estate of a deceased person. As to the property of the deceased, the administrator stands in his place to dispose of it as the law directs. When the heirs or creditors desire to reach it, it can only be done through himself, and whenever it is found that a *devastavit* has been committed, his own property can alone be reached through the same channel. *Id.*

16. The remedy upon administration or testamentary bonds is cumulative, and not substitutional. *Id.*

17. Bill filed by complainants, legatees to recover their legacies from the respondent, the administrator, on two accounts corrected on exceptions by the Orphans' Court; the respondent pleaded *laches*, Statute of Limitations, and a pending right of appeal, but failed to add the affidavit that said pleas were not made for delay; complainants moved for a decree *pro confesso* for want of such affidavit, which was granted "or attachment in thirty days;" on expiration of this time, and failure to comply with this decree, complainants moved for a rule to show cause why decree had not been performed, or why attachment should not issue, which was

EXECUTORS AND ADMINISTRATORS — *Continued.*

refused, it appearing that respondent, although owning valuable real estate, was unable to raise the requisite amount. Held, that a writ of sequestration *de bonis propriis* should be granted, a *devastavit* having been committed. *Id.*

FORECLOSURE. See MORTGAGE.

FORFEITURE.

1. A refusal by a number of pilots who own and operate their own pilot boat, and who have the boat properly manned and equipped to render good service, to allow a pilot designated by the pilot commissioners to cruise on her, is not a combination to prevent a person from executing the duties of a pilot within act of April 5, 1881, providing for the forfeiture of the license if a pilot enter into such a combination. *Morris et al. v. Pilot Commissioners*, 136.

2. The act of April 5, 1881, and its supplements, creating the Board of Pilot Commissioners and empowering it to forfeit the license of any pilot entering into a combination to prevent another pilot from discharging his duties, requires that the party charged with such a combination shall have an opportunity of being heard; and no order or decree of the board before conviction and after opportunity given for hearing, shall work such a forfeiture; nor is an order of the board, inflicting as a penalty for such a combination an indefinite revocation of the license, lawful, it being the first offense alleged and the statute expressly providing a forfeiture for three months only in such a case. *Id.*

3. The power vested in the Board of Pilot Commissioners to make rules for the government of pilots, and to decide differences, carries with it the incidental power to enforce the same by the imposition of reasonable pecuniary penalties, without any express grant of power to that effect. But the right to inflict a forfeiture as a penalty, must be plainly given, and cannot be derived from usage or raised by implication. *Id.*

4. The Court of Chancery will enjoin the Board of Pilot Commissioners from revoking a license where the ground upon which the revocation is threatened is not one specifically provided for by the statute creating the board. *Id.*

5. While the general doctrine is that equity may relieve against forfeitures declared by contract but not against those declared or unauthorized by statute, yet when they are not expressly declared or authorized, equity will relieve by the interposition of its injunctive power. *Id.*

See DOWER.

GIFT. See **LEGACY AND LEGATEE.**

GUARDIAN AND WARD.

1. An executor, administrator, or guardian should not place money belonging to the estate or ward with a private banking institution. *Allen et al. v. Leach*, 83.

2. A bequest to a minor legatee can legally be paid only to his properly accredited guardian, and not to his parent. *Spruance v. Darlington*, 111.

HEIR-AT-LAW.

Under a will directing the executor merely to sell testator's real property, and divide the proceeds in a certain manner, the title thereto in fee descends to the heirs-at-law, subject to the power to sell, and they alone are entitled to the rents and profits thereof from the death of the testator up to the time of the exercise of the power to sell. *Spruance v. Darlington*, 111.

See **WILL**, 7, 8.

INCOME. See **ACCUMULATION.**

INFANT.

A bequest to a minor legatee can legally be paid only to his properly accredited guardian, and not to his parent. *Spruance v. Darlington*, 111.

INJUNCTION.

1. The Court of Chancery will enjoin the Board of Pilot Commissioners from revoking a license where the ground upon which the revocation is threatened is not one specifically provided for by the statute creating the board. *Morris v. Pilot Commissioners*, 136.

2. While the general doctrine is that equity may relieve against forfeitures declared by contract but not against those declared or unauthorized by statute, yet when they are not expressly declared or authorized, equity will relieve by the interposition of its injunctive power. *Id.*

3. To enjoin or restrain a party from committing an act which in itself would not be injurious to the party complaining, would be an improper exercise of this extraordinary power of this court. *Jessup & Moore Paper Co. v. Ford*, 226.

4. C. W. E., who was president of the J. P. Co., being indebted to complainant, gave him a bond, and assigned, as collateral security, 200 shares of stock in said company and a policy of insurance. Coupled with such assignment was a written agreement between them, that complainant would not interfere with the management of the said company, would

INJUNCTION — *Continued.*

retransfer a certain part of said stock upon payment of a certain part of said indebtedness, or would retransfer the whole of said stock upon payment of the whole of said indebtedness; but that on failure of the conditions of said bond, or to keep up said insurance policy, said assignment of the stock and the policy should become absolute. The transfer of said stock was not made on the books of said company, but notice of the transfer was served on C. W. E. as its president. The charter and by-laws of the company were entirely silent as to the transfer or assignment of shares of stock. Subsequently, T. S., one of the defendants, recovered a judgment against C. W. E., issued a *fi. fa.*, with clause of attachment, and attached said 200 shares of stock, and advertised same for sale. On bill to enjoin the sale of said shares of stock by T. S.,—Held, that it was not necessary that the shares should be transferred on the books of the company, and that the injunction should be granted. *Allen v. Stewart et al.*, 287

See INSANITY; DEMURRER.

INSANITY.

1. The Court of Chancery in this State, by special legislative grant, has jurisdiction of alleged lunatics from the very inception of the process by which their sanity or insanity is finally and definitively ascertained; and has the power to suspend or supersede the control of the supposed insane person over his property during the interim between the granting and the execution of the writ of insanity. In *re Harris*, 42.

2. During lunacy proceedings, the presumption or sanity must remain in abeyance so far as it relates to the temporary restraint of the personal liberty and property of the supposed insane person. *Id.*

3. When petitioned to restrain a supposed insane person from control over his property during pendency of lunacy proceedings, the Court of Chancery should not examine into the case more than is necessary to move it to grant the order for the protection of the alleged lunatic's person and estate; and, therefore, counter affidavits, negating the allegations contained in the sworn statements of the petitioner, will not be heard. *Id.*

4. The petition for a restraining order is but collateral to the proceedings in lunacy, and dependent upon it for its foundation, and the affidavits upon which the lunacy proceedings are founded may be used in aid of this application. *Id.*

5. The statement in the petition for a restraining order during the pendency of lunacy proceedings, supported by affidavit, that respondent has parted with large sums of money

INSANITY — Continued.

without receiving a visible equivalent therefor, will prevail against an answer which denies the respondent's mental incapacity, and his being under the influence of any persons for any purpose whatever, but does not specifically deny that statement in the petition; and is *prima facie* evidence of the incompetency of the respondent to govern himself and manage his estate, and justifies the Court of Chancery in granting such order. *Id.*

INSOLVENCY.

Under the act relating to insolvent corporations which does not provide for the order in which the debts shall be paid, judgment debts have no precedence over simple contract debts. In *re Lord & Polk Chemical Co.*, 248.

INSPECTION. See **BOOKS OF CORPORATION.****INTENT.**

Whenever, upon the face of a will, two intents are manifest, the one general and for a general period, and the other particular, for a particular period and a particular portion of the estate, the two are not held as conflicting, but the latter is to be taken as an exception to the former. *E. G. & T. Co. v. Rogers et al.*, 398.

ISSUE. See **WILL**, 7, 8.**JUDGMENT.** See **LIEN**, 3.**JURISDICTION.**

1. The Court of Chancery in this State, by special legislative grant, has jurisdiction of alleged lunatics from the very inception of the process by which their sanity or insanity is finally and definitively ascertained; and has the power to suspend or supersede the control of the supposed insane person over his property during the interim between the granting and the execution of the writ of insanity. In *re Harris*, 42.

2. A court of equity has jurisdiction of all matters in dispute between any and all parties to an action, the adjudication of which may affect the integrity of a trust fund in which all are interested, though the controversy as between some of them may be of a legal nature. *Spruance v. Darlington*, 111.

3. The jurisdiction of courts of equity is not entirely determined by the absence or presence of adequate legal remedy, though either is not an unimportant element in aiding the solution of such a question. *Id.*

JURISDICTION — *Continued.*

4. The transfer of a fund from a legal to an equitable jurisdiction will not exempt it from the law of its original jurisdiction. In re Lord & Polk Chemical Co., 248.

LACHES.

A plea of *laches*, or Statute of Limitations, must be accompanied by an affidavit that the plea is not made for delay; otherwise a decree *pro confesso* will be entered for want of such affidavit. Allen et al. v. Leach, 232.

LANDLORD AND TENANT.

1. The testator, by item 2 of his will, devised to his wife, M. J., a farm during her life; and at her death, directed same to be sold, and the proceeds thereof to be equally divided among his children, share and share alike. Held, that one of the said children who lived on the land for a period between the death of the tenant for life and the sale of the land, was liable to the other children either on a contract for rent, or in case for use and occupation, less the value of permanent improvements made by him. In re Journey, 1.

2. Under a will directing the executor merely to sell testator's real property, and divide the proceeds in a certain manner, the title thereto in fee descends to the heirs-at-law, subject to the power to sell, and they alone are entitled to the rents and profits thereof from the death of the testator up to the time of the exercise of the power to sell. Spruance v. Darlington, 111.

LEASE. See LANDLORD AND TENANT.

LEGACY AND LEGATEE.

1. The testator, P. R., bequeathed to his son, J. R., in trust for the three blind children of said J. R., namely: G. U. R., E. R. and J. R., 100 shares of bank stock which, together with dividends, he directed should be invested for said three blind children during the lifetime of said J. R., and if either of said blind children should die under age and unmarried, said shares should belong to the survivor or survivors. And by a codicil thereto, he further provided that if all of said blind children should die under age and without issue, then said stock should be divided equally among all his children. J. R., one of said children, died over the age of twenty-one years, unmarried and without issue, leaving as his legatee, G. U. R. E. R. died over the age of twenty-one years, unmarried, without issue and intestate. Held,—

LEGACY AND LEGATEE — *Continued.*

a. That the estates in said bank stocks became, immediately upon the death of P. R., the testator, a vested estate.

b. That said estates were subject to be divested in favor of the survivor or survivors of said blind children upon the death of any of them, under age and unmarried, or in favor of the children or their representatives of the said P. R., deceased, upon the death of all of said blind children under age and without issue.

c. That said gifts of said stock upon the happening of said events, can now never take effect. And,

d. That at the time of the deaths of J. R. and E. R., they owned their respective shares of stock by an absolute and indefeasible title. *Reybold v. Reybold*, 29.

2. A bequest to a minor legatee can legally be paid only to his properly accredited guardian, and not to his parent. *Spruance v. Darlington*, 111.

3. Bill filed by complainants, legatees, to recover their legacies from the respondent, the administrator, on two accounts corrected on exceptions by the Orphans' Court, the respondent pleaded *laches*, Statute of Limitations, and a pending right of appeal, but failed to add the affidavit that said pleas were not made for delay; complainants moved for a decree *pro confesso* for want of such affidavit, which was granted "or attachment in thirty days;" on expiration of this time and failure to comply with this decree, complainants moved for a rule to show cause why decree had not been performed or why attachment should not issue, which was refused, it appearing that respondent, although owning valuable real estate, was unable to raise the requisite amount. Held, that a writ of sequestration *de bonis propriis* should be granted, a *devastavit* having been committed. *Allen et al. v. Leach*, 232.

4. The testator, prior to his decease, entered into a contract with certain persons, by which the latter were to go upon his land and cut and saw the timber thereon, and to receive a compensation part in money and part in wood. The contract was in process of performance when the testator made his will in which he devised the land in fee to M. J. W. "Provided, however, that all the timber on the aforesaid land shall be worked as per contract now existing, and the rising issues therefrom shall be paid into my estate and be equally divided among my lawful heirs." Shortly after testator's decease, the contract was abandoned by the contractees, who were totally insolvent. Held, that M. J. W., by the abandonment, was entitled, under the devise of the fee in the land, to all the timber as well. *Lambden v. West*, 266.

See WILL; DEVISE.

LIBERTY. See PERSONAL RIGHTS, 1.

LICENSE. See FORFEITURE, 1, 2.

LIEN.

1. Equity looks not so much at the form of a debt as to the good faith in which it was made or created. The law recognizes diligence in creditors and gives them a preference according to the rank or grade of their debt; equity, however, imputes no particular merit to diligence unless the advantage thereby acquired amounts to a lien, or some vested right or interest which neither equity nor law will allow to be disturbed. In re Lord & Polk Chemical Co., 248.

2. There is no common-law rule which makes the levy and apportionment of the taxes *ex proprio rigore* liens on the property of the taxable. Such liens can only be created by statute. There is no statute in this State declaring real estate taxes to be liens on personal property, without the intervention of some kind of execution process. The only mode, therefore, of reducing them to such liens is by distress. *Id.*

3. Under the act relating to insolvent corporations which does not provide for the order in which the debts shall be paid, judgment debts have no precedence over simple contract debts. *Id.*

See DEED; RECEIVER, 2.

LIMITATIONS, STATUTE OF.

1. Section 21, article 6 of the Constitution provides that the executor, administrator or guardian shall, within three months after settlement of his account, give notice in writing to all persons entitled to shares of the estate, or to their guardians, respectively, if residing within the State, that the account is lodged in the office of the register of wills for inspection. Until this notice is given, the Statute of Limitations cannot be pleaded to exceptions to the account, notwithstanding the statute which provides that "no exceptions to an account of an administrator, executor or guardian, settled by the register for the county, shall be received and filed in the Orphans' Court after the expiration of three years from the settlement of said account." Allen et al. v. Leach, 83.

2. As against an executor's cause of action for assets of the estate against one who acted as executor under a will which was afterwards found to have been revoked, the Statute of Limitations does not begin to run until letters of administration have been granted to the executor properly appointed. Spruance v. Darlington, 111.

LIMITATIONS, STATUTE OF — *Continued*.

3. The Statute of Limitations does not begin to run against the right of legatees under testator's true will, discovered after his estate had been administered under a supposed will, until the granting of letters of administration under the former; they supposing their rights settled under the revoked instrument, and so accepting them. *Id*.

4. A plea of *laches*, or Statute of Limitations, must be accompanied by an affidavit that the plea is not made for delay; otherwise, a decree *pro confesso* will be entered for want of such affidavit. *Allen et al. v. Leach*, 232.

LOCATION.

1. In order to constitute such a location of the route of a railroad in this State as will exhaust the power of eminent domain conferred in its charter, some acts must be done which vest mutual rights or liabilities between the corporation and landowners along such route. *Williams v. O. & M. R. Co.*, 303.

2. A location is not a mere right, it is an act; it is not a power to do a thing, it is the thing itself. *Id*.

LUNACY AND LUNATIC. See INSANITY.

MONUMENT. See EXECUTORS AND ADMINISTRATORS, 5.

MORTGAGE.

1. The concurrent use of two or more remedies adapted to the enforcement of a mortgage debt, each of which would produce precisely the same result, falls without the rule permitting a mortgagee to exercise all his remedies concurrently. *Van Vrankin v. Roberts et al.*, 16.

2. In Delaware a mortgagee has a right to proceed on his mortgage in equity and at law. In equity by foreclosure, at law by *scire facias*. He also has the right to proceed on his bond or other legal security for the debt. There is no doubt that he may pursue the last-named remedy, and either of the others, at the same time, so that he does not take double satisfaction. *Id*.

3. A mortgagee proceeding by *scire facias* in the Superior Court, and afterwards by a bill in equity, in which latter proceeding the property was sold, cannot recover costs incurred in the former proceeding. *Id*.

4. A mortgagee cannot use concurrently his remedy by *scire facias* and by bill in equity, and the beginning of the latter is a constructive abandonment of the former previously begun. *Id*.

MORTGAGE — Continued.

5. A receiver appointed under the act relating to insolvent corporations, paid off the real estate taxes out of a fund in his hands arising from the sale of the personal property. A real estate mortgage, being the first lien, was then foreclosed. Held, that an amount equivalent to that paid in taxes should be deducted from the fund applicable to the mortgage, and added to that applicable to a subsequent judgment creditor. In re Lord & Polk Chemical Co., 248.

ORDER.

1. Under the clause authorizing the Board of Pilot Commissioners "to make rules for the government of pilots," etc., the orderly course of procedure is to make general rules in pursuance of that power, and the assignment of a pilot to one of the boats in the pilotage service without having first made a general rule on the subject, partakes of the nature of an order and not a rule and is not within the terms of the act. *Morris et al. v. Pilot Commissioners*, 136.

2. The words "rule" and "order," when used in a statute, have a definite significance. They are different in their nature and extent. A rule, to be valid, must be general in its scope and undiscriminating in its application; an order is specific and limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made. *Id.*

PARENT AND CHILD. See **INFANT**; **GUARDIAN AND WARD.**

PARTIES.

1. It is a well-established and undoubted rule in equity proceedings, that all persons materially interested should be parties to the suit, either as complainants or defendants, in order that the court may determine the rights of all parties interested in the subject-matter of the suit, and make a complete decree. *Mayor et al. v. Addicks et al.*, 56.

2. Whenever a want of proper parties appears on the face of a bill, the proper mode to take advantage of this objection is by a demurrer. *Id.*

3. A mere reference in the bill to an alleged corporation, coupled with an express denial of its legal existence, is not a fatal admission on a demurrer for want of parties. If defendants rely upon such actual existence, a different mode of pleading must be adopted. *Id.*

4. The mayor and council of Wilmington, at the instance of the individual members of the board of directors of the street and sewer department of said city, filed a bill to enjoin certain individuals from opening the streets of said city, to

PARTIES -- Continued.

lay gas pipes, without the previous consent of such board. Defendants demurred on the ground that the bill alleged that said defendants were acting as officers and agents of the Oxy-Hydrogen Company, of this State, and that, therefore, said company should have been made a party defendant. Held, that the demurrer must be overruled, for the reason that the bill only stated that individual defendants claimed to act as such officers and agents and expressly denied the actual existence of said company; and that the demurrer, admitting all the facts in the bill, admitted the truth of such express denial of the actual existence of such company; that if the defendants relied upon such actual existence, they should have adopted some other mode of pleading. *Id.*

PENALTY. See FORFEITURE.**PERSONAL RIGHTS.**

During lunacy proceedings, the presumption of sanity must remain in abeyance so far as it relates to the temporary restraint of the personal liberty and property of the supposed insane person. *In re Harris*, 42.

PILOTS.

1. A refusal by a number of pilots who own and operate their own pilot boat, and who have the boat properly manned and equipped to render good service, to allow a pilot designated by the pilot commissioners to cruise on her, is not a combination to prevent a person from executing the duties of a pilot within act of April 5, 1881, providing for the forfeiture of the license if a pilot enter into such a combination. *Morris et al. v. Pilot Commissioners*, 136.

2. The act of April 5, 1881, and its supplements, creating the Board of Pilot Commissioners and empowering it to forfeit the license of any pilot entering into a combination to prevent another pilot from discharging his duties, requires that the party charged with such a combination shall have an opportunity of being heard; and no order or decree of the board before conviction and after opportunity given for hearing, shall work such a forfeiture; nor is an order of the board inflicting as a penalty for such a combination an indefinite revocation of the license, lawful, it being the first offense alleged and the statute expressly providing a forfeiture for three months only in such a case. *Id.*

3. The power vested in the Board of Pilot Commissioners to make rules for the government of pilots, and to decide differences, carries with it the incidental power to enforce the same by the imposition of reasonable pecuniary penalties,

PILOTS — Continued.

without any express grant of power to that effect. But the right to inflict a forfeiture as a penalty, must be plainly given, and cannot be derived from usage or raised by implication. *Id.*

4. Pilot boats, though owned and managed exclusively by certain of the pilots, are to a certain extent dedicated to the public service, and the private property rights of their owners must be made subservient whenever the public good requires it, but no further. The Board of Pilot Commissioners has, therefore, the implied right to make such rules and regulations concerning boats in the service as would be conducive to the general interest, but not otherwise; and the allotment by the board of a pilot to a boat already properly manned and equipped is without its power. *Id.*

5. Under the clause authorizing the Board of Pilot Commissioners "to make rules for the government of pilots," etc., the orderly course of procedure is to make general rules in pursuance of that power, and the assignment of a pilot to one of the boats in the pilotage service without having first made a general rule on the subject, partakes of the nature of an order and not a rule, and is not within the terms of the act. *Id.*

6. The Court of Chancery will enjoin the Board of Pilot Commissioners from revoking a license where the ground upon which the revocation is threatened is not one specifically provided for by the statute creating the board. *Id.*

PLEADING. See **LIMITATIONS, STATUTE OF, 1, 4; DEMURBER.**

PLENE ADMINISTRAVIT.

If an executor or administrator in a suit against him in his representative capacity, pleads *plene administravit*, and on issue it is found against him, his liability to the extent of assets found in his hands, is fixed; and if they be not forthcoming, he must answer out of his own property. *Allen et al. v. Leach, 232.*

POWER.

1. An authority to make a sale of lands, under a will, is a mere naked power which carries with it no estate or title to the trustee or person having in charge the execution of the will. *In re Journey, 1.*

2. Under a will directing the executor merely to sell testator's real property, and divide the proceeds in a certain manner, the title thereto in fee descends to the heirs-at-law, subject to the power to sell, and they alone are entitled to the rents and profits thereof from the death of the testator up to

POWER — *Continued.*

the time of the exercise of the power to sell. *Spruance v. Darlington*, 111.

3. M. B., being the owner of one-fourth interest in certain lands, made a deed in trust to E. B. for her own benefit, with power to the trustee to sell on her written order. J. P. purchased and obtained a deed for the other three-fourths interest in said lands, and also paid to M. B. the price for her said one-fourth interest, and obtained a deed from E. B., the trustee, therefor. This last deed purported to be an execution of the power to sell contained in the original trust deed, but referred to no written order from M. B. except by stating that M. B. had written a letter stating that "I give my sanction to the arrangement mentioned in Joseph's letter, and desire Edward to do what is needful," which said letter was written by M. B. as and for such an order. J. P. went into possession of said lands and has occupied same for over twenty years. Afterwards, upon the death of E. B., the trustee, a deed of confirmation of said last deed was made to J. P. by the eldest male issue of the trustee, and by all the heirs-at-law of M. B., she having also died. There were judgments against two of the said heirs prior and at the time of the execution of said last deed of confirmation. On bill for specific performance by J. P. against H. Y. on an agreement by H. Y. to purchase a clear title to said lands, free of incumbrances,—Held, that J. P. could give such a title. *Parker v. Yerger*, 208.

PRACTICE. See **AFFIDAVIT**; **ANSWER**; **ATTACHMENT**; **CONTEMPT**; **DECREE PRO CONFESSO**; **DEMURRER**; **DEVASTAVIT**; **EVIDENCE**; **INSANITY**; **PARTIES**; **PLENE ADMINISTRAVIT**; **SEQUESTRATION**.

PRESUMPTIONS.

During lunacy proceedings, the presumption of sanity must remain in abeyance so far as it relates to the temporary restraint of the personal liberty and property of the supposed insane person. *In re Harris*, 42.

PRIORITY.

Under the act relating to insolvent corporations which does not provide for the order in which the debts shall be paid, judgment debts have no precedence over simple contract debts. *In re Lord & Polk Chemical Co.*, 248.

PROFITS.

The testator, prior to his decease, entered into a contract with certain persons, by which the latter were to go upon his land and cut and saw the timber thereon, and to receive

PROFITS — Continued.

a compensation part in money and part in wood. The contract was in process of performance when the testator made his will in which he devised the land in fee to M. J. W. "Provided, however, that all the timber on the aforesaid land shall be worked as per contract now existing, and the rising issues therefrom shall be paid into my estate and be equally divided among my lawful heirs." Shortly after testator's decease, the contract was abandoned by the contractees, who were totally insolvent. Held, that M. J. W., by the abandonment, was entitled, under the devise of the fee in the land, to all the timber as well. *Lambden v. West*, 266.

PROPERTY. See PERSONAL RIGHTS, 1.**RAILROAD.**

1. It is the settled law of this State that the condemnation proceedings alone establish nothing, vest nothing, and fix nothing except only the price at which the land inquired upon may be had from the proprietor by the corporation. *Williams v. O. & M. R. Co.*, 303.

2. The award of freeholders on condemnation proceedings does not, of itself, render the corporation liable to the landowners for the amount fixed by the award. *Id.*

3. Upon an abandonment by a corporation, after condemnation proceedings, of a proposed route, the corporation is liable not only for the cost of such condemnation proceedings, but also for all damages and expenses reasonably incurred by the owners of land along such abandoned route, by reason of those proceedings. *Id.*

4. Except through *laches* or waiver, the power of election cannot be lost, except by such a selection of one of the subjects or rights embraced by the election, as confers a positive right to the subject or right so selected, upon the party in whom the election once existed. *Id.*

5. In order to constitute such a location of the route of a railroad in this State as will exhaust the power of eminent domain conferred in its charter, some acts must be done which vest mutual rights or liabilities between the corporation and landowners along such route. *Id.*

6. A location is not a mere right, it is an act; it is not a power to do a thing, it is the thing itself. *Id.*

7. Difference between the English law in regard to railroad corporations and condemnation proceedings, and that in this State. *Id.*

8. By the charter of the O. & M. railway, the respondent, it was provided "that the said company shall have power to lo-

RAILROAD — Continued.

cate, survey and purchase such lands and rights of way within the limits of New Castle County as said company may deem necessary for their purpose," the termini being specified; and by another provision of the charter, the mode of having freeholders appointed for inquisition and condemnation proceedings was fixed, and it was then provided that "the said freeholders, or a majority of them, shall certify their finding and award to both parties, whereupon the said company, upon paying the damages so assessed, or depositing the same in the N. C. N. Bank, to the credit of said owner or owners, shall become entitled to have, use and enjoy said lands and rights of way for the purpose of said company forever." The respondent proceeded to survey its proposed route. Being unable to agree as to the price of the lands desired, condemnation proceedings were had under its charter. The respondent and all parties interested were present, either in person or by attorney, during these proceedings and at the announcement of the award. Immediately upon this announcement the respondent asserted that the damages fixed were more than it could pay, and notified the freeholders that it was unnecessary to serve notice of the award as provided in its charter. No such notice was in fact served, and neither the whole nor any part of the damages were paid, tendered or deposited as provided in the charter. Subsequently, the respondent applied for and secured the appointment of another set of freeholders for the condemnation of a right of way over another and entirely different route. Held, that the survey and condemnation proceedings over the first route did not exhaust the power of eminent domain conferred upon the respondent by its charter, and that it had the right to change its first proposed route. *Id.*

RECEIVER.

1. Under the act relating to insolvent corporations which does not provide for the order in which the debts shall be paid, judgment debts have no precedence over simple contract debts. *In re Lord & Polk Chemical Co.*, 248.

2. A receiver appointed under the act relating to insolvent corporations, paid off the real estate taxes out of a fund in his hands arising from the sale of the personal property. A real estate mortgage, being the first lien, was then foreclosed. Held, that an amount equivalent to that paid in taxes should be deducted from the fund applicable to the mortgage, and added to that applicable to a subsequent judgment creditor. *Id.*

RECORDS. See **BOOKS OF CORPORATION.**

REMEDY.

1. The concurrent use of two or more remedies adapted to the enforcement of a mortgage debt, each of which would produce precisely the same result, falls without the rule permitting a mortgagee to exercise all his remedies concurrently. *Van Vrankin v. Roberts et al.*, 16.

2. In Delaware a mortgagee has a right to proceed on his mortgage in equity and at law. In equity by foreclosure, at law by *scire facias*. He also has the right to proceed on his bond or other legal security for the debt. There is no doubt that he may pursue the last-named remedy, and either of the others, at the same time, so that he does not take double satisfaction. *Id.*

3. A mortgagee proceeding by *scire facias* in the Superior Court, and afterward by a bill in equity, in which latter proceeding the property was sold, cannot recover costs incurred in the former proceeding. *Id.*

4. A mortgagee cannot use concurrently his remedy by *scire facias* and by bill in equity, and the beginning of the latter is a constructive abandonment of the former previously begun. *Id.*

5. The jurisdiction of courts of equity is not entirely determined by the absence or presence of adequate legal remedy, though either is not an unimportant element in aiding the solution of such a question. *Spruance v. Darlington*, 111.

6. The remedy upon administration or testamentary bonds is cumulative, and not substitutional. *Allen et al. v. Leach*, 232.

RENT. See **LANDLORD AND TENANT**, 1.

RESTRAINING ORDER. See **INSANITY**.

REVOCATION. See **WILL**, 5, 7, 8.

RULE.

1. Pilot boats, though owned and managed exclusively by certain of the pilots, are to a certain extent dedicated to the public service, and the private property rights of their owners must be made subservient whenever the public good requires it, but no further. The Board of Pilot Commissioners has, therefore, the implied right to make such rules and regulations concerning boats in the service as would be conducive to the general interest, but not otherwise; and the allotment by the board of a pilot to a boat already properly manned and equipped is without its power. *Morris et al. v. Pilot Commissioners*, 136.

RULE — *Continued.*

2. Under the clause authorizing the Board of Pilot Commissioners "to make rules for the government of pilots," etc., the orderly course of procedure is to make general rules in pursuance of that power, and the assignment of a pilot to one of the boats in the pilotage service without having first made a general rule on the subject, partakes of the nature of an order and not a rule, and is not within the terms of the act. *Id.*

3. The words "rule" and "order," when used in a statute, have a definite significance. They are different in their nature and extent. A rule, to be valid, must be general in its scope and undiscriminating in its application; an order is specific and limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made. *Id.*

SCIRE FACIAS. See **MORTGAGE.**

SEQUESTRATION.

Bill filed by complainants, legatees, to recover their legacies from the respondent, the administrator, on two accounts corrected on exceptions by the Orphans' Court, the respondent pleaded *laches*, Statute of Limitations, and a pending right of appeal, but failed to add the affidavit that said pleas were not made for delay; complainants moved for a decree *pro confesso* for want of such affidavit, which was granted, or attachment in thirty days;" on expiration of this time, and failure to comply with this decree, complainants moved for a rule to show cause why decree had not been performed, or why attachment should not issue, which was refused, it appearing that respondent, although owning valuable real estate, was unable to raise the requisite amount. Held, that a writ of sequestration *de bonis propriis* should be granted, a *devastavit* having been committed. *Allen et al. v. Leach*, 232.

SPECIFIC PERFORMANCE.

M. B., being the owner of one-fourth interest in certain lands, made a deed in trust to E. B. for her own benefit, with power to the trustee to sell on her written order. J. P. purchased and obtained a deed for the other three-fourths interest in said lands, and also paid to M. B. the price for her said one-fourth interest, and obtained a deed from E. B., the trustee, therefor. This last deed purported to be an execution of the power to sell contained in the original trust deed, but referred to no written order from M. B., except by stating that M. B. had written a letter stating that "I

SPECIFIC PERFORMANCE — *Continued.*

give my sanction to the arrangement mentioned in Joseph's letter, and desire Edward to do what is needful," which said letter was written by M. B., as and for such an order. J. P. went into possession of said lands, and has occupied same for over twenty years. Afterwards, upon the death of E. B., the trustee, a deed of confirmation of said last deed was made to J. P. by the eldest male issue of the trustee, and by all the heirs-at-law of M. B., she having also died. There were judgments against two of the said heirs prior and at the time of the execution of said last deed of confirmation. On the bill for specific performance by J. P. against H. Y., on an agreement by H. Y. to purchase a clear title to said lands, free of incumbrances,—Held, that J. P. could give such a title. *Parker v. Yerger*, 208.

STATUTE.

Whenever a statute undertakes to provide for a specific matter or thing already covered by a common-law rule, omissions in its provisions of certain portions of the rule may be taken as indicative of a legislative intent to repeal or abrogate the same. And this, though in all other respects the statute and common law are in exact conformity. In re *Lord & Polk Chemical Co.*, 248.

STOCK.

1. The provisions of section 18, chapter 147, volume 17, Delaware Laws, Revised Code, 576, that "the shares of stock in every corporation in this State shall be deemed personal property, and shall be transferable on the books of the corporation in such manner as the by-laws shall provide, and whenever any transfer of shares shall be made for collateral security, and not absolutely, the same shall be so expressed in the entry of such transfer, "does not make an assignment on the books of the corporation necessary, to vest title in a transferee of shares of stock. *Allen v. Stewart et al.*, 287.

2. An assignment on the books of a corporation is not necessary in order to vest title in the transferee of shares of stock, either in the case where the by-laws of the corporation are silent upon transfers, or in the case where its by-laws do define a mode for such transfer, *unless* the charter or some general law expressly requires an assignment on the books. *Id.*

3. The provisions of the by-laws of a corporation defining a mode of transferring shares of stock, do not exclude all other modes, unless the charter, or some general law, negatives any other mode of transfer. *Id.*

STOCK — Continued.

4. In the absence of any statutory provision, or of a by-law upon the subject, shares of stock in a corporation are transferable as any chose in action, and like them, the transfers of stock may be either legal or equitable. *Id.*

5. C. W. E., who was president of the J. P. Co., being indebted to complainant, gave him a bond, and assigned, as collateral security, 200 shares of stock in said company and a policy of insurance. Coupled with such assignment was a written agreement between them, that complainant would not interfere with the management of the said company, would retransfer a certain part of said stock upon payment of a certain part of said indebtedness, or would retransfer the whole of said stock upon payment of the whole of said indebtedness; but that on failure of the conditions of said bond, or to keep up said insurance policy, said assignment of the stock and the policy should become absolute. The transfer of said stock was not made on the books of said company, but notice of the transfer was served on C. W. E., as its president. The charter and by-laws of the company were entirely silent as to the transfer or assignment of shares of stock. Subsequently, T. S., one of the defendants, recovered a judgment against C. W. E., issued a *fi. fa.*, with clause of attachment, and attached said 200 shares of stock, and advertised same for sale. On bill to enjoin the sale of said shares of stock by T. H.,—Held, that it was not necessary that the shares should be transferred on the books of the company, and that the injunction should be granted. *Id.*

TAX.

There is no common-law rule which makes the levy and apportionment of the taxes *ex proprio vigore* liens on the property of the taxable. Such liens can only be created by statute. There is no statute in this State declaring real estate taxes to be liens on personal property, without the intervention of some kind of execution process. The only mode, therefore, of reducing them to such liens is by distress. *In re Lord & Polk Chemical Co.*, 248.

See RECEIVER, 2.

TOMBSTONE. See EXECUTORS AND ADMINISTRATORS.

TRUST AND TRUSTEE.

1. An authority to make a sale of lands, under a will, is a mere naked power which carries with it no estate or title to the trustee or person having in charge the execution of the will. *In re Journey*, 1.

TRUST AND TRUSTEE — *Continued.*

2. The testator, P. R., bequeathed to his son, J. R., in trust for the three blind children of said J. R., namely: G. U. R., E. R. and J. R., 100 shares of bank stock which, together with dividends, he directed should be invested for said three blind children during the lifetime of said J. R., and if either of said blind children should die under age and unmarried, said shares should belong to the survivor or survivors. And by a codicil thereto, he further provided that if all of said blind children should die under age and without issue, then said stock should be divided equally among all of his children. J. R., one of said children, died over the age of twenty-one years, unmarried and without issue, leaving as his legatee, G. U. R. E. R. died over the age of twenty-one years, unmarried, without issue and intestate. Held,—

a. That the estates in said bank stocks became, immediately upon the death of P. R., the testator, a vested estate.

b. That said estates were subject to be divested in favor of the survivor or survivors of said blind children upon the death of any of them, under age and unmarried, or in favor of the children or their representatives of the said P. R., deceased, upon the death of all of said blind children under age and without issue.

c. That said gifts of said stock upon the happening of said events, can now never take effect. And,

d. That at the time of the deaths of J. R. and E. R., they owned their respective shares of stock by an absolute and indefeasible title. *Reybold v. Reybold*, 29.

3. A court of equity has jurisdiction of all matters in dispute between any and all parties to an action, the adjudication of which may affect the integrity of a trust fund in which all are interested, though the controversy as between some of them may be of a legal nature. *Spruance v. Darlington*, 111.

4. When no time is fixed by the testator for the division of the estate directed in the will, it becomes the duty of the court to fix such a time as will best aid in carrying into effect the uses, intents and purposes for which the trust created in the will was established. *Frost v. McCauley et al.*, 162.

5. The testator, by will, gave his executors power to encumber his estate at their discretion, and then to sell it and divide the proceeds into eleven shares. As to the last of these shares, he provided as follows: "The income of one other, and the last of said shares or parts, I give to F. H. F., payable half-yearly for ten years, after which time I give the same to her absolutely." In another part of the will, he provided that: "And I hereby authorize my ex-

TRUST AND TRUSTEE — *Continued.*

ecutors and trustees, at their discretion, to pay to any of my children who may need it, such sums from time to time, before the estate is settled, as they may deem needful and proper; the same to be accounted for as part of the income of their shares in my estate respectively." Held,—

a. That the gift to F. H. F. was an absolute vested legacy, but that it would have been otherwise had it been a gift of the principal, without the gift of the income during the interval between the death of the testator and the expiration of ten years thereafter.

b. That the ten years is to be calculated from the date of the death of the testator and not from the date of the settlement by the executors. *Id.*

6. M. B., being the owner of one-fourth interest in certain lands, made a deed in trust to E. B. for her own benefit, with power to the trustee to sell on her written order. J. P. purchased and obtained a deed for the other three-fourths interest in said lands, and also paid to M. B. the price for her said one-fourth interest, and obtained a deed from E. B., the trustee, therefor. This last deed purported to be an execution of the power to sell contained in the original trust deed, but referred to no written order from M. B., except by stating that M. B. had written a letter stating that "I give my sanction to the arrangement mentioned in Joseph's letter, and desire Edward to do what is needful," which said letter was written by M. B. as and for such an order. J. P. went into possession of said lands, and has occupied same for over twenty years. Afterwards, upon the death of E. B., the trustee, a deed of confirmation of said last deed was made to J. P. by the eldest male issue of the trustee, and by all the heirs-at-law of M. B., she having also died. There were judgments against two of the said heirs prior and at the time of the execution of said last deed of confirmation. On bill for specific performance by J. P. against H. Y. on an agreement by H. Y. to purchase a clear title to said lands, free of incumbrances,—Held, that J. P. could give such a title. *Parker v. Yerger*, 208.

7. Whenever upon the face of a will, two intents are manifest, the one general and for a general period, and the other particular, for a particular period and a particular portion of the estate, the two are not held as conflicting, but the latter is to be taken as an exception to the former. *E. G. & T. Co. v. Rogers et al.*, 398.

8. A testator devised all his estate to trustees in trust to hold all the rest and residue of his estate (after reserving as much of the securities as they might deem necessary to raise a certain annuity for his widow), in trust to apply so

TRUST AND TRUSTEE — *Continued.*

much of the income thereof as they might deem proper to the support and education of his children during their minority, and in trust when his first child should attain the age of twenty-one years, to divide his residuary estate into so many shares as there were children at the time of the division; and as the children arrive respectively at their majorities, to pay over to them respectively the income of their respective shares of his estate for the term of their natural lives, etc. In section 7 of the will, the following occurs: "I hereby declare that my said executors" (trustees) "shall stand possessed of the accumulations of my residuary estate and the income thereof, upon and for the same trusts and subject to the same declarations hereinbefore made concerning the estate from which such accumulations shall have proceeded."

a. Held, that the accumulations, enhancements and increase in certain stocks forming a part of the estate from the death of the testator up to the majority of the eldest child, the period fixed by the will for the division, were to be treated as a part of the *corpus* or capital of the estate and subject to the declaration of trust, and not as income to be paid to the children absolutely.

b. But held, also, that such accumulations, enhancements and increase on the share of the youngest child from the majority of the eldest to her own majority, would go absolutely to her as income.

c. Held, also, that all excess in the amount reserved by the trustees for the raising of the widow's annuity over and above what was necessary, was a part of the *corpus* or capital of the estate, and not income.

d. Held, also, that the word "accumulations," as used in section 7, would cover the yearly earnings and profits of a corporation in which the testator held stock, in whatever form they might exist, which had not been distributed in dividends among the owners of the stock at the time it went into liquidation. *E. G. & T. Co. v. Rogers et al.*, 399.

USE AND OCCUPATION. See **LANDLORD AND TENANT**, 1.

WILL.

1. It is a well-settled rule in equity, that land directed to be converted into money, or money into land, will be considered as that species of property into which it is directed to be converted. It is equally well settled, that the beneficiaries under a will, in which their interests arise from money, or land, ordered to be converted into one or the other, take as legatees or devisees according to the nature or quality of the

WILL — Continued.

property in its converted state or condition. In re Journey, 1.

2. An authority to make a sale of lands, under a will, is a mere naked power which carries with it no estate or title to the trustee or person having in charge the execution of the will. *Id.*

3. When no time is fixed by the testator for the division of the estate directed in the will, it becomes the duty of the court to fix such a time as will best aid in carrying into effect the uses, intents and purposes for which the trust created in the will was established. *Frost v. McCaulley et al.*, 162.

4. The testator, by will, gave his executors power to incumber his estate at their discretion, and then to sell it and divide the proceeds into eleven shares. As to the last of these shares, he provided as follows: "The income of one other, and the last of said shares or parts, I give to F. H. F., payable half-yearly for ten years, after which time I give the same to her absolutely." In another part of the will, he provided that: "And I hereby authorize my executors and trustees, at their discretion, to pay to any of my children who may need it, such sums from time to time, before the estate is settled, as they may deem needful and proper; the same to be accounted for as part of the income of their shares in my estate respectively." *Held*,—

a. That the gift to F. H. F. was an absolute vested legacy, but that it would have been otherwise had it been a gift of the principal, without the gift of the income during the interval between the death of the testator and the expiration of ten years thereafter.

b. That the ten years is to be calculated from the date of the death of the testator and not from the date of the settlement by the executors. *Id.*

5. In order that a codicil shall operate as a revocation of any part of a will, in the absence of express words to that effect, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention. They are both supposed to be made and executed with the same solemnity and deliberation, and, therefore, both are entitled to the same degree of consideration. The will and the codicil constitute part of the same testament, and they are each, in legal estimation, equally sacred and inviolate. Any part of the one, not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language. *Bringhurst v. Orth et al.*, 178.

WILL — Continued.

6. In the construction of a will with a codicil annexed, any part of the one, not inconsistent with the other, either expressly or inferentially, cannot be set aside as unnecessary language. *Id.*

7. The term "issue," used in a codicil, and the term "heirs-at-law," used in a will, when employed to denote the beneficiaries and not to limit the quantity or duration of an estate in lands, are not, of necessity, so contradictory as to lead to a revocation of the provision of the will. *Id.*

8. In one of the items of her will, the testatrix provided that "if any of the devisees or legatees in this my will named, shall die before me, then the said devisees and legacies shall not lapse, but shall pass and go to such person and persons as would be the heirs-at-law of such devisee or legatee under the intestate laws of the State of Delaware." In the codicil to said will, it was provided that, "in case of the death before my death of any of the legatees or devisees named in my will, the shares of those dying before me, to go to their issue, the said issue to take the share of their deceased parent, except as to any share which would go to S. D. P.," etc. Held, that the codicil did not revoke the quoted provision of the will, and that the shares of certain legatees dying before the testatrix without issue, did not lapse. *Id.*

9. The conditions which existed at the time of the testator's death must be regarded as existing now, as the status of the parties under the will was fixed at the moment of his decease. *Lambden v. West*, 266.

10. Whenever, upon the face of a will, two intents are manifest, the one general and for a general period, and the other particular, for a particular period and a particular portion of the estate, the two are not held as conflicting, but the latter is to be taken as an exception to the former. *E. G. & T. Co. v. Rogers et al.*, 398.

11. A testator devised all his estate to trustees in trust to hold all the rest and residue of his estate (after reserving as much of the securities as they might deem necessary to raise a certain annuity for his widow), in trust to apply so much of the income thereof as they might deem proper to the support and education of his children during their minority, and in trust when his first child should attain the age of twenty-one years, to divide his residuary estate into so many shares as there were children at the time of the division; and as the children arrive respectively at their majorities, to pay over to them respectively the income of their respective shares of his estate for the term of their natural

WILL — Continued.

lives, etc. In section 7 of the will, the following occurs: "I hereby declare that my said executors" (trustees) "shall stand possessed of the accumulations of my residuary estate and the income thereof, upon and for the same trusts and subject to the same declarations hereinbefore made concerning the estate from which such accumulations shall have proceeded."

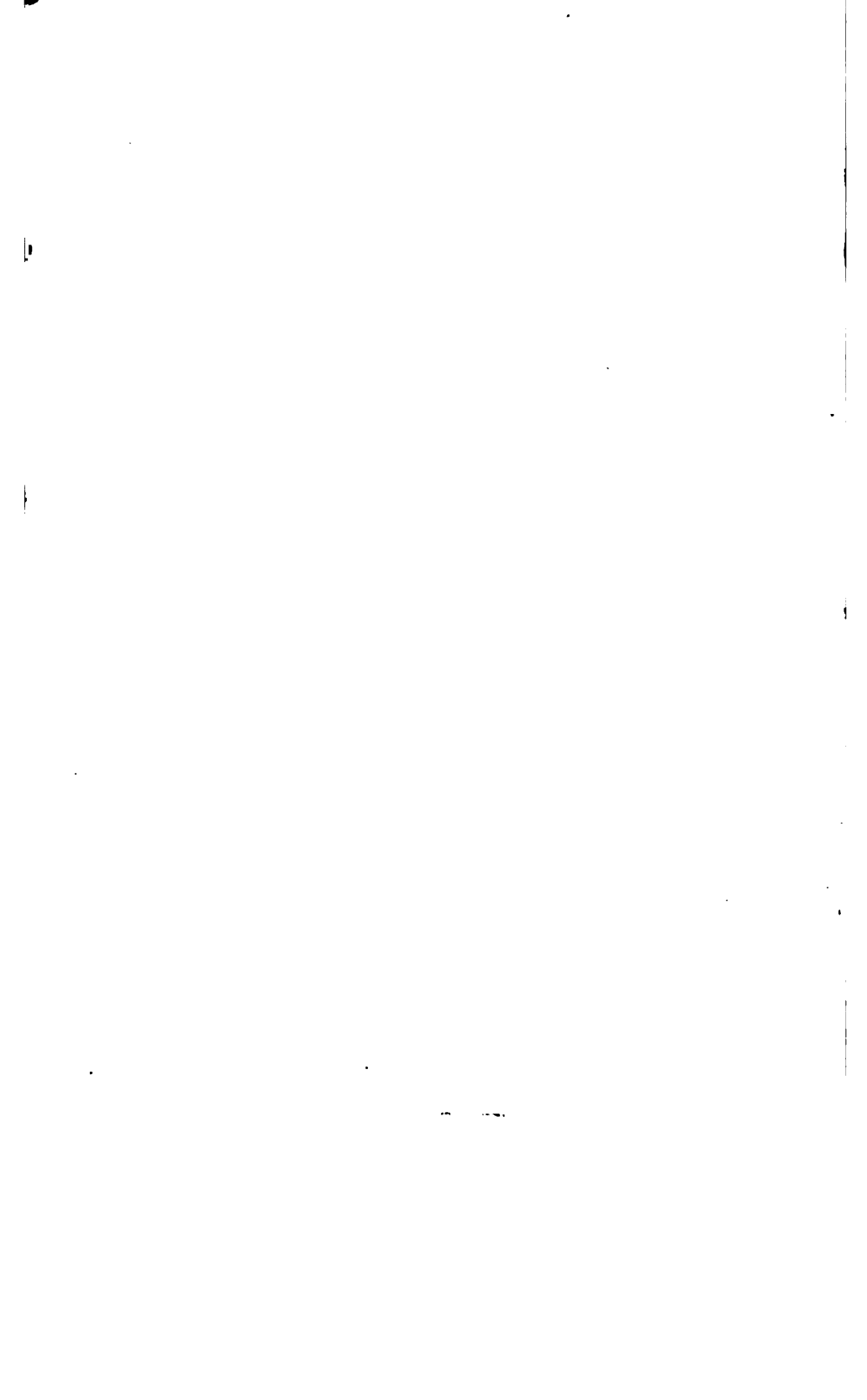
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b. But held, also, that such accumulations, enhancements and increase on the share of the youngest child from the majority of the eldest to her own majority, would go absolutely to her as income.

c. Held, also, that all excess in the amount reserved by the trustees for the raising of the widow's annuity over and above what was necessary, was a part of the *corpus* or capital of the estate, and not income.

d. Held, also, that the word "accumulations," as used in section 7, would cover the yearly earnings and profits of a corporation in which the testator held stock, in whatever form they might exist, which had not been distributed in dividends among the owners of the stock at the time it went into liquidation. *Id.*

See DEVISE; ELECTION, 1; EXECUTORS AND ADMINISTRATORS;
LEGACY AND LEGATEE.



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